Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1996

TEXAS MANUFACTURED HOUSING ASSOCIATION, INC.,

Petitioner,

vs.

CITY OF LA PORTE and ZONING BOARD OF ADJUSTMENT OF THE CITY OF LA PORTE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether this case should be remanded to the Court of Appeals for reconsideration in light of:

(a) this Court's recent decision in *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 117 S.Ct. 1590 (1997); and/or

(b) HUD's recent Statement of Policy 1997-1, which construes the preemptive scope of 42 U.S.C. § 5403(d).

II. Whether lack of intent to violate federal and constitutional law excuses:

(a) a municipal regulation that has the practical effect of encroaching upon an area of law reserved exclusively by Congress; and/or

(b) a municipal regulation that has the practical effect of discriminating against interstate commerce in favor of intrastate commerce.

III. Whether a Dormant Commerce Clause claim can be disposed adversely by summary judgment where the challenger demonstrates a burden on interstate commerce and submits evidence of less burdensome alternatives to achieve the state's putative purpose.

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. Petitioner Texas Manufactured Housing Association, Inc. ("TMHA") has a single wholly-owned subsidiary named TMHA Services, Inc., which is a for-profit corporation organized under the laws of the State of Texas, engaged principally in the sale of publications and forms for the use of businesses involved in the manufactured housing industry. With the exception of TMHA Services, Inc., TMHA has no parent and no other subsidiaries or affiliates.

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The unreported opinion of the Court of Appeals is reproduced in the Appendix filed herewith ("App.") at 3a. The unreported opinions of the district court are reproduced in the Appendix at 6a and 33a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on April 10, 1997. On April 24, 1997, Petitioner filed its Petition for Rehearing, which was denied by the Court of Appeals on May 7, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent provision of the National Manufactured Housing Construction and Safety Standards Act of 1974, as amended, 42 U.S.C. § 5401 *et seq.*, is set forth below:

> **5403(d) Supremacy of Federal standards**
>
> Whenever a Federal manufactured home construction and safety standard established under this chapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any manufactured home covered, any standard regarding construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the Federal manufactured home construction and safety standard.

STATEMENT OF THE CASE

In 1993, Janet Stevenson[1] filed an application with the City of La Porte, Texas, to place a new "HUD-code manufactured home" on her property. The home was to replace a similar home which had been destroyed by fire. For sake of clarity, a "HUD-code manufactured home" is the modern-day counterpart of what was once known as a "mobile home." Since June 15, 1976, manufactured homes have been required to meet preemptive federal construction and safety standards promulgated by the United States Department of Housing and Urban Development. *See* 42 U.S.C. § 5403. In contrast, a "mobile home" is defined under Texas law as having been built before the onset of federal regulation. *See, e.g.*, Tex. Rev. Civ. Stat. Ann. art. 5221f, § 3(1) (Vernon Supp. 1997). The City denied Ms. Stevenson's request by citing Ordinance 1501, its comprehensive zoning ordinance. Under Ordinance 1501, HUD-code manufactured homes are not permitted in the City's R-1 residential districts (Ms. Stevenson's property was located in such a district). Importantly, the City informed Ms. Stevenson that one of her "options" was to replace her fire-damaged home with a "modular" home.[2] Modular homes

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1. Ms. Stevenson, formerly a plaintiff in this lawsuit, is no longer a party. In January 1996, she settled her claims at mediation.

2. Letter from Mark S. Lewis, Chief Building Official, to Janet A. Stevenson, dated October 6, 1993 (Exh. 1 to Exh. J to TMHA's Response in Opposition to La Porte's Motion for Summary Judgment). Lewis described a modular home as a "type of manufactured home." *Id.* Like a HUD-code manufactured home, a "modular" home is a species of factory-built housing. A modular home and a similarly equipped HUD-code manufactured home look virtually identical in terms of their outward visual characteristics, and they serve the same purposes (*i.e.*, single-family residential housing). This was the affidavit testimony of Will Ehrle, TMHA's President and General Counsel (Exh. E to TMHA's Response in Opposition to La Porte's Motion

(Cont'd)

are permitted in the City's R-1 residential districts. Ms. Stevenson appealed the decision to the City's Zoning Board of Adjustment, to no avail.

In 1994, Ms. Stevenson, joined and supported by the Texas Manufactured Housing Association, Inc. ("TMHA"), the statewide trade association which represents the manufactured housing industry in Texas, filed a complaint in the United States District Court for the Southern District of Texas. The complaint alleged that Ordinance 1501 is preempted by federal law, namely, the National Manufactured Housing Construction and Safety Standards Act of 1974, as amended, 42 U.S.C. § 5401 *et seq.* (NMHCSSA). The complaint also challenged the constitutionality of Ordinance 1501 under the Dormant Commerce Clause. Subject matter jurisdiction over all these claims was proper under 28 U.S.C. § 1331.

District Judge Nancy Atlas dismissed the entire case by granting the City's motion for summary judgment. On appeal, the United States Court of Appeals for the Fifth Circuit affirmed. In a terse, two-page per curiam opinion, the Fifth Circuit based its holding on circuit precedent, namely *Texas Manufactured Housing Association, Inc., et al. v. City of Nederland, et al.*, 101 F.3d 1095 (5th Cir. 1996), *cert. denied*, __ S.Ct. __ (1997). Although the *Nederland* case involved a different ordinance and a considerably different factual record, the Fifth Circuit was

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(Cont'd)
for Summary Judgment). The difference lies in the construction standards to which each is built. Since 1976, all manufactured housing in the United States is built to the HUD code. *See* 42 U.S.C. § 5403. In contrast, modular housing is regulated at the state level. In Texas, modular housing is built to the Texas modular building code, a code which is itself an amalgamation of various standardized building codes which are locally applied to "site-built" residential construction. *See* Tex. Rev. Civ. Stat. Ann. art. 5221f-1 (Vernon 1987 & Supp. 1997); 16 Tex. Admin. Code § 70.100 (West 1996).

not persuaded that the factual distinctions raised a genuine issue of material fact sufficient to preclude summary judgment (App. B, 5a).

One month after the Fifth Circuit's decision, HUD published its Statement of Policy 1997-1. 62 Fed. Reg. 24337 (May 5, 1997) (App. E, 65a). For the first time, HUD announced explicit guidelines for deciding whether zoning practices that exclude manufactured housing while simultaneously allowing other forms of factory-built housing violate 42 U.S.C. § 5403(d).

Five weeks after the Fifth Circuit's decision, this Court handed down its opinion in *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 117 S.Ct. 1590 (1997). Importantly, *Camps* compels trial courts to examine *any* incidence of discrimination against interstate commerce, however slight.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ, vacate the judgment, and remand to the Fifth Circuit ("GVR") for reconsideration in light of two recent developments: (1) this Court's recent decision in *Camps*, 117 S.Ct. 1590, and (2) HUD's Statement of Policy, released May 5, 1997. The Fifth Circuit did not have the benefit of either of these two developments when it decided both this case and the *Nederland* case.

This Court should grant the writ to resolve a conflict with the Eleventh Circuit's decision in *Scurlock v. City of Lynn Haven, Fla.*, 858 F.2d 1521 (11th Cir. 1988). A resolution of the conflict calls for this Court to determine whether lack of intent to violate federal law excuses a municipal regulation that has the practical effect of encroaching upon an area of law reserved exclusively by Congress. Another reason for granting the writ is for this Court to determine whether lack of protectionist intent excuses a municipal regulation that has the practical effect of

discriminating against interstate commerce in favor of intrastate commerce. In this case, the City of La Porte argues that it should be exempt from liability because it was engaged in the exercise of its police power.

Yet another reason for granting the writ is for this Court to establish a uniform rule for determining the circumstances under which the balancing test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), can be applied at the summary judgment level.

I.

THIS CASE SHOULD BE REMANDED TO THE COURT OF APPEALS FOR RECONSIDERATION IN LIGHT OF THIS COURT'S RECENT DECISION IN *CAMPS NEWFOUND/OWATONNA, INC. v. TOWN OF HARRISON, ME.*, 117 S.Ct. 1590 (1997).

This Court should issue a GVR order so that this case can be reconsidered in light of *Camps*, 117 S.Ct. 1590. District Judge Atlas gave little credence to TMHA's Dormant Commerce Clause claim, apparently because of a concern for the size of the markets involved. She openly questioned whether there is an "identifiable and statistically significant impact on interstate commerce resulting from the prohibition of manufactured homes from a segment of a single city, La Porte" (App. C, 22a). Constitutionality, however, is not measured by the quantitative impact on the national economy, a point which resonates throughout the *Camps* opinion. *See Camps*, 117 S.Ct. at 1608 ("even the smallest scale discrimination can interfere with the project of our federal Union"). There is simply no *de minimis* defense to discrimination which favors intrastate commerce over interstate commerce.

Camps was handed down after the Fifth Circuit rendered its decision in this case (April 10, 1997). *Camps* compels close analysis of *any* incidence of discrimination, however slight, and the opinion removes evidentiary obstacles which were erected in this case by both the district court and the Fifth Circuit.[3] With *Camps* as a guidepost, there is a reasonable probability that, upon further consideration, the Fifth Circuit would find a violation of the Dormant Commerce Clause. Under these circumstances, it would be appropriate for this Court to grant the writ, vacate the judgment, and remand the case to the Fifth Circuit for reconsideration in light of *Camps*. *See Lords Landing Village Condominium Council of Unit Owners vs. Continental Insurance Co.*, 117 S.Ct. 1731, 1732 (1997).

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3. In *Camps*, this Court emphasized that the aggrieved party is not required to show that any one particular person actually changed his or her position "as a result of the burden imposed" on interstate commerce. *See Camps*, 117 S.Ct. at 1600 n.15. Such a requirement "misconstrues the proper analysis." *Id.* This undoubtedly would have changed the result in *Texas Manufactured Housing Association, Inc., et al. v. City of Nederland, et al.*, 101 F.3d 1095 (5th Cir. 1996), *cert. denied*, __ S.Ct. __ (1997), where TMHA argued that, because a person *could* place a modular home on his or her own property, Nederland's ban on HUD-code manufactured housing confers benefits on the Texas modular housing industry, an intrastate industry. Because TMHA did not demonstrate that these types of purchasing decisions were actually being made by Nederland residents, the Fifth Circuit held that "Plaintiffs have not demonstrated that whatever mode of housing is built in lieu of HUD-code manufactured homes, it will be provided by in-state suppliers." *Id.* at 1104. Under *Camps*, TMHA is not required to show that one or more La Porte residents have actually purchased modular housing in lieu of HUD-code manufactured housing.

Notably, La Porte's own officials acknowledge that modular housing (1) is a substitute for HUD-code manufactured housing; and (2) has, in fact, been placed at various locations in the City (Exh. J to TMHA's Response in Opposition to La Porte's Motion for Summary Judgment).

II.

THIS COURT SHOULD REMAND THIS CASE TO THE COURT OF APPEALS FOR RECONSIDERATION IN LIGHT OF HUD'S STATEMENT OF POLICY 1997-1, RELEASED MAY 5, 1997.

On May 5, 1997, after the Fifth Circuit decided this case, HUD published its Statement of Policy 1997-1. *See* 62 Fed. Reg. 24337 (1997) (App. E, 65a).[4] Its Statement of Policy represents HUD's first attempt to articulate the types of zoning practices that violate 42 U.S.C. § 5403(d).[5] HUD began its analysis by noting that state and local governments were "imposing more limitations on the placement of manufactured homes that are built to the Federal manufactured home construction and safety standards . . . than on other types of factory-built single family housing." 62 Fed. Reg. 24337 (App. E, 67a). HUD declared that "a locality cannot exclude or restrict manufactured homes that meet the Federal standards if the locality accepts manufactured homes meeting other standards." *Id.* at 24338 (App. E, 70a). According to HUD, "such a system of local regulation and

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4. HUD's goal is to expand the use of manufactured housing in areas "outside of parks and largely rural areas." 62 Fed. Reg. 24337 (1997) (App. E, 68a). The Statement of Policy was issued "as an initial step toward the elimination of barriers to the use of manufactured housing and in furtherance of the goals and objectives of the National Homeownership Strategy." *Id.* (App. E, 68a). Manufactured housing, which accounted for one-fourth of all the single-family houses that were built in this country in 1995, plays a strategic role in the Clinton Administration's efforts to increase homeownership. *The National Homeownership Strategy: Partners in the American Dream* (1995) (working paper prepared by United States Department of Housing and Urban Development).

5. Previously, HUD analyzed zoning practices on a case-by-case basis, issuing "preemption letters" to the offending municipalities. 62 Fed. Reg. 24337 (1997) (App. E, 67a).

enforcement would interfere with Federal superintendence of the manufactured home industry, in contravention of 24 C.F.R. 3282.11(d)." *Id.* (App. E, 71a).

La Porte's zoning scheme violates § 5403(d) under HUD's Statement of Policy 1997-1.[6] La Porte cannot exclude HUD-code manufactured homes if the City allows other types of structures that meet the federal definition of "manufactured home" contained in 42 U.S.C. § 5402(6). 62 Fed. Reg. 24338 (App. E, 70a). Since a modular home can meet the federal definition of manufactured home,[7] and since La Porte allows modular homes in its R-1 districts but not HUD-code manufactured housing, La Porte's zoning practices are preempted by § 5403(d). Under Statement of Policy 1997-1, La Porte's reason for excluding HUD-code manufactured housing (which La Porte alleges to be unrelated to construction standards) is completely irrelevant to the analysis.

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6. Undoubtedly, since Congress has delegated its authority to HUD, 42 U.S.C. § 5424, HUD's declarations and pronouncements have no less preemptive effect than the federal statute itself. *See Fidelity Federal Savings and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982).

7. *See* 42 U.S.C. § 5402(6). La Porte argues that a "modular" home does not meet the federal definition of "manufactured home" because the latter requires a "permanent chassis." La Porte wrongly assumes that a modular home cannot be built on a permanent chassis. However, as early as 1976, HUD recognized "that some structures that have traditionally been considered to be modular homes are now sometimes being manufactured with and transported on permanent chassis similar to those used to transport [manufactured] homes." 41 Fed. Reg. 24,968 (1976). Even the Texas statute defines modular housing without making reference to a permanent chassis. *See* Tex. Rev. Civ. Stat. Ann. art. 5221f-1, § 1(1) (Vernon 1987).

Interestingly, Mark Lewis, La Porte's Chief Building Official, described a modular home as a "type of manufactured home" (Exh. 1 to Exh. J to TMHA's Response in Opposition to La Porte's Motion for Summary Judgment).

Given the timing of its publication (May 5, 1997), HUD's Statement of Policy 1997-1 was not considered by the Fifth Circuit, which rendered its decision on April 10, 1997. There is a reasonable probability that, upon further consideration, the Fifth Circuit would find the Statement of Policy applicable to the facts of this case, which would change the ultimate outcome of this litigation. Under these circumstances, it would be appropriate for this Court to issue a GVR order. *See Lords Landing*, 117 S.Ct. at 1732.

III.

WHERE A MUNICIPAL REGULATION HAS THE PRACTICAL EFFECT OF ENCROACHING UPON AN AREA OF LAW RESERVED EXCLUSIVELY BY CONGRESS, THE PREEMPTION VIOLATION SHOULD NOT BE EXCUSED SIMPLY BECAUSE THE MUNICIPALITY DID NOT INTEND TO CREATE THE UNLAWFUL EFFECT.

The Fifth Circuit's decision conflicts with the Eleventh Circuit's decision in *Scurlock*, 858 F.2d 1521. In *Scurlock*, a local land use ordinance excluded from particular residential districts any structures that were not constructed to meet a finite set of building codes that had been sanctioned by the city. On appeal, the Eleventh Circuit held that, because it effectively imposed a different set of construction standards on HUD-code manufactured homes (which did not meet the different standards), the ordinance was preempted by 42 U.S.C. § 5403(d). *Id.*, 858 F.2d at 1525; *see Colorado Manufactured Housing Association v. Board of County Commissioners, etc.*, 946 F.Supp. 1539 (D. Colo. 1996) (same).

The only distinction between this case and *Scurlock* is the issue of intent. In *Scurlock*, the City of Lynn Haven expressly

intended to condition entry into its R-AA residential districts upon compliance with a prescribed set of building codes. La Porte is similarly conditioning entry into its R-1 residential districts upon compliance with a prescribed set of building codes,[8] but there is no direct proof available that La Porte actually *intends* this result.[9]

If *Scurlock* is distinguishable, it is only because La Porte's *intent* is viewed as decisive in evaluating the preemption question. In dismissing TMHA's claim, District Judge Atlas focused *solely* on intent, finding that "La Porte's exclusion of manufactured housing from 'R-1' districts . . . is merely a restriction on [the] *location* of manufactured housing" (App. C, 10a) (emphasis in original). This Court, however, has historically ignored intent when deciding preemption cases. *See, e.g., Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132,

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8. According to La Porte's Ordinance 1501, modular housing is permissible in the City's R-1 residential districts, while HUD-code manufactured housing is prohibited. It can fairly be concluded, therefore, that La Porte accepts factory-built housing that is constructed to one set of standards (*i.e.*, modular housing) but excludes factory-built housing that is built to another set of standards (*i.e.*, HUD-code manufactured housing).

9. There is nothing in the language of its Ordinance 1501 which proves that the exclusion of HUD-code manufactured housing is based on La Porte's preference for structures that are constructed to meet its local building code, but there is circumstantial evidence in the summary judgment record which suggests that the building code issue plays a role in La Porte's decisionmaking. For example, during the discovery phase of this lawsuit, La Porte proclaimed that modular homes are "constructed to meet more stringent safety requirements than are HUD-code homes" (Exh. M [p. 16] to TMHA's Response in Opposition to La Porte's Motion for Summary Judgment). Similarly, in a letter to Ms. Stevenson, La Porte's Chief Building Official wrote that, as between the two types of factory-built housing, a modular home "will comply with the City's zoning and *building code* requirements" (Exh. 2 to Exh. J to TMHA's Response in Opposition to La Porte's Motion for Summary Judgment) (emphasis added).

142 (1963) ("The test [is] not whether [the two laws] are aimed at similar or different objectives"). This Court has long acknowledged that a statute designed to operate in one substantive area can have demonstrative effects in an exclusive area reserved by Congress. *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 388 (1992) (regulating advertising affects rates); *see also Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) (common law damages actions have the effect of imposing affirmative requirements).

Intent, therefore, is too narrow to serve as the focal point in preemption analysis. Accordingly, La Porte should not be able to escape liability simply by asserting that its *intention* is something other than conditioning entry upon compliance with a prescribed set of building codes.[10] Moreover, the fact that La Porte was exercising its police power should be completely irrelevant where the supremacy of federal law is at stake. *See, e.g., Love v. Foster*, 90 F.3d 1026 (5th Cir.), *pet. for reh'g and suggestion for reh'g en banc denied*, 100 F.3d 413 (5th Cir. 1996), *cert. granted*, 117 S.Ct. 1243 (1997) (invalidating on preemption grounds Louisiana's open primary election system as it applies to federal elections).

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10. It is undisputed that *intentionally* conditioning entry upon compliance with a prescribed set of building codes violates 42 U.S.C. § 5403(d). *See Scurlock*, 858 F.2d 1521. This result should not change merely because the condition is *unintentional*.

IV.

WHERE A MUNICIPAL REGULATION HAS THE PRACTICAL EFFECT OF DISCRIMINATING AGAINST INTERSTATE COMMERCE IN FAVOR OF INTRASTATE COMMERCE, THE DORMANT COMMERCE CLAUSE VIOLATION SHOULD NOT BE EXCUSED SIMPLY BECAUSE THE MUNICIPALITY WAS NOT ACTING WITH A PROTECTIONIST INTENT.

Under the Dormant Commerce Clause, discrimination is defined as "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems, Inc. v. Dept. of Environmental Quality, etc.*, 511 U.S. 93, 99 (1994). This Court has never demanded proof of protectionist intent. *See, e.g., Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 352 (1977) (there is no need to "ascribe an economic protection motive" to find discrimination). The reason for not requiring protectionist intent lies in the political theory underlying the Commerce Clause. A majority of this Court continues to recognize that enforcing the "dormant" aspect of the Commerce Clause serves the broad purpose of promoting and preserving national solidarity. *See Camps*, 117 S.Ct. at 1607-08 (1997); *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 390 (1994); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935). If the sting of what appears to be economic protectionism is felt, then the danger of retaliatory reprisals will not be lessened in the slightest merely because the regulation was not actually motivated by protectionism. This Court has recognized in other contexts that the objective of anti-discrimination provisions would be "difficult if not impossible to reach" if all that was proscribed was "conduct fueled by a discriminatory intent." *Alexander v. Choate*, 469 U.S. 287, 296-97 (1985). The *Oregon Waste* model of discrimination focuses, not on intent but on

whether competition between interstate commerce and intrastate commerce is negatively affected. *See, e.g., General Motors Corporation v. Tracy*, 117 S.Ct. 811 (1997) (finding no Dormant Commerce Clause violation because, *inter alia*, removal of the challenged regulation would not promote competition).

Intent played a key role in the outcome of this case. District Judge Atlas found no discrimination because there was "no evidence that La Porte was motivated by economic protectionism" (App. C, 31a). Moreover, Judge Atlas overlooked the fact that Ordinance 1501 changed the competitive aspect of the housing market. After acknowledging that Ordinance 1501 places the Texas modular housing market at a competitive advantage vis-a-vis the interstate market in HUD-code manufactured housing (App. C, 26a),[11] a finding which should have ended the inquiry in TMHA's favor, District Judge Atlas dismissed the advantage as merely "incidental" because La Porte did not *intend* to alter the competitive balance between the two industries.

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11. Modular housing and HUD-code manufactured housing compete for the same residential customers. This point was acknowledged by La Porte's Chief Building Official, who testified (1) that modular housing is an acceptable "option" for replacing a manufactured home; (2) that modular housing is "intended to be used for residential purposes;" and (3) that modular homes have "been placed in a few different locations in [La Porte]" (Exh. J to TMHA's Response in Opposition to La Porte's Motion for Summary Judgment). Therefore, removing the ban on HUD-code manufactured housing in La Porte's R-1 residential districts would naturally increase competition for that subset of consumers who can afford both modular housing and HUD-code manufactured housing. Moreover, TMHA should not have been required to prove this point with scientific certainty. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 117 S.Ct. 1590, 1600 n.15 (1997).

V.

WHERE THE CHALLENGER DEMONSTRATES A BURDEN ON INTERSTATE COMMERCE AND SUBMITS EVIDENCE OF LESS BURDENSOME ALTERNATIVES TO ACHIEVE THE STATE'S PUTATIVE PURPOSE, SUMMARY JUDGMENT IS INAPPROPRIATE TO ADVERSELY DISPOSE OF A DORMANT COMMERCE CLAUSE CHALLENGE.

Another reason for granting the writ is to develop a uniform approach for applying the *Pike* balancing test at the summary judgment level. If the challenger fails to show a burden on interstate commerce, there is nothing to balance, and summary judgment is proper. *See Gary D. Peake Excavating, Inc. v. Town Bd. of Town of Hancock, N.Y.*, 93 F.3d 68 (2d Cir. 1996); *Instructional Systems, Inc. v. Computer Curriculum Corp.*, 35 F.3d 813 (3rd Cir. 1994), *cert. denied*, 513 U.S. 1183 (1995); *Old Bridge Chemicals, Inc. v. New Jersey Dept. of Environmental Protection*, 965 F.2d 1287, 1295 (3d Cir.), *cert. denied*, 506 U.S. 1000 (1992) ("the regulations imposed no burden on interstate commerce").

If, however, the challenger shows a burden on interstate commerce,[12] the burden must be weighed using the *Pike* formula. The courts of appeals have not adhered to any consistent, unifying principle for determining the circumstances when it is appropriate to apply the *Pike* test as a matter of law and when a full-blown trial on the merits is required. The caselaw reveals two conflicting approaches. For example, where a regulation's

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12. There can be little doubt that interstate commerce is burdened by any ordinance which restricts its influx into a particular locale. The summary judgment record reflects that TMHA quantified this burden at more than $1.6 million over a four-year period (Exh. O to TMHA's Response in Opposition to La Porte's Motion for Summary Judgment).

benefits and burdens are evident, some courts are content to do the balancing on the basis of a summary judgment record. *See, e.g., Tolchin v. Supreme Court of New Jersey*, 111 F.3d 1099 (3rd Cir. 1997); *Medical Waste Associates Limited Partnership v. Mayor and City Council of Baltimore*, 966 F.2d 148 (4th Cir. 1992); *Ferndale Laboratories, Inc. v. Cavendish*, 79 F.3d 488 (6th Cir. 1996); *Kleenwell Biohazard Waste and General Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391 (9th Cir.), *cert. denied*, 115 S.Ct. 2580 (1995); *Kirkpatrick v. Shaw*, 70 F.3d 100 (11th Cir. 1995).[13]

In contrast, when presented with similar summary judgment records (*i.e.*, where the record discloses the state's putative interest and a burden on interstate commerce is shown), other courts are reluctant to apply the *Pike* test without a trial. *See, e.g., Ben Oehrleins and Sons and Daughter, Inc. v. Hennepin County*, 115 F.3d 1372 (8th Cir. 1997); *Cotto Waxo Company v. Williams*, 46 F.3d 790 (8th Cir. 1995); *Blue Circle Cement, Inc. v. Board of County Commissioners, etc.*, 27 F.3d 1499 (10th Cir. 1994). In *Cotto Waxo*, the Eighth Circuit acknowledged the burden on interstate commerce but conceded it had "no concrete sense of how [the challenged regulation] has affected other manufacturers or the interstate market as a whole." 46 F.3d at 795. The court similarly acknowledged that, although the regulation benefits the public by protecting the environment, *id.* at 794, the state "failed to submit any evidence related to either the amount of conservation achieved by the [regulation] or the amount of contamination prevented by the [regulation]," *id.* at 795. In *Blue Circle*, a public purpose was articulated, but,

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13. Interestingly, the balancing in these cases consisted solely of examining the burden on interstate commerce and the purposes served by the challenged regulation. There was no discussion of whether less burdensome alternatives were available to achieve the state's purposes even though this Court continues to acknowledge that, under *Pike*, this is one of the factors to be weighed. *See Camps*, 117 S.Ct. at 1620 (Thomas, J., dissenting).

because the regulation "may further the public interest so marginally" or "interfere with commerce so substantially," the court found that the mere incantation of a public purpose is "inadequate to support a summary judgment" upholding the regulation. 27 F.3d at 1512 (quoting *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670 (1981)).

If a burden on interstate commerce is shown, and if the state articulates a public purpose that is served by the challenged regulation, the question of whether the *Pike* test can be applied as a matter of law should turn on whether the challenger submits evidence on *Pike*'s third element, *viz.*, the availability of less burdensome alternatives to achieve the state's purposes. If the challenger fails to submit evidence on this point, then the *Pike* test is little more than a policy choice between two competing interests, *see Camps*, 117 S.Ct. at 1619-20 (Thomas, J., dissenting), a decision which courts could make just as easily at the summary judgment stage without further inquiry into either the extent of the burden or the extent to which the regulation actually achieves the public purpose. If, however, the challenger submits summary judgment evidence of less burdensome alternatives (as TMHA did here), then determining the extent to which the alternatives can achieve the state's purposes necessarily calls for factual inquiries that should only be developed by a full-blown trial on the merits.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted. Alternatively, this Court should issue a GVR order.

Respectfully submitted,

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APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING FILED MAY 7, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-20422

TEXAS MANUFACTURED HOUSING ASSOCIATION; ET AL

Plaintiffs

TEXAS MANUFACTURED HOUSING ASSOCIATION

Plaintiff - Appellant

v.

CITY OF LA PORTE and ZONING BOARD OF ADJUSTMENT

Defendant - Appellee

Appeal from the United States District Court for the Southern District of Texas, Houston

ON PETITION FOR REHEARING

Before JONES, STEWART, and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

Appendix A

ENTERED FOR THE COURT:

s/ Edith H. Jones
United States Circuit Judge

APPENDIX B — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED APRIL 10, 1997

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-20422

TEXAS MANUFACTURED HOUSING ASSOCIATION, INC., ET AL.,

Plaintiffs,

TEXAS MANUFACTURED HOUSING ASSOCIATION, INC.,

Plaintiff-Appellant,

versus

CITY OF LA PORTE, AND ZONING BOARD OF ADJUSTMENT OF THE CITY OF LA PORTE,

Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Texas
Houston Division
(H-94-CV-1066)

Before JONES, STEWART, and DENNIS, Circuit Judges

PER CURIAM:*

The Texas Manufactured Housing Association, Inc., ("TMHA") and Jan Stevenson brought this suit against the City

* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

of La Porte and the Zoning Board of Adjustment of the City of La Porte (collectively, "La Porte") to challenge La Porte's denial of Mrs. Stevenson's request to place a manufactured home on her lot in an R-1 residential district. La Porte denied the request pursuant to its Ordinance 1501, which specifically excludes manufactured housing from R-1 residential districts. Mrs. Stevenson eventually settled her claim with La Porte, and the district court granted summary judgment for La Porte on all of TMHA's numerous challenges to Ordinance 1501. On appeal, TMHA only challenges the denial of its commerce clause, federal and state preemption, and equal protection claims.

Having carefully considered the oral arguments, briefs, the opinions of the district court, and the record, we conclude that the recent panel decision in *Texas Manufactured Housing Ass'n, Inc. v. Nederland*, 101 F.3d 1095 (5th Cir. 1996), essentially forecloses TMHA's arguments. In particular, we have reviewed the affidavits and exhibits** relied upon by TMHA at oral

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** Including, but not limited to, the letters of Mark S. Lewis, Chief Building Official of La Porte, to Mrs. Stevenson dated October 6, 1993 and October 14, 1993, and the affidavit of Will Ehrle, President and General Counsel of TMHA.

We have also reviewed the decision in *Colorado Manufactured Housing Association v. Board of County Commissioners of the County of Pueblo, Colorado*, 946 F. Supp. 1539 (1996), submitted by TMHA pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure. As to its treatment of the preemption issue, we do not find that opinion to be contrary to our decision, since the court only found preempted local ordinances which permitted manufactured housing only if it met local building or safety codes that were stricter than the federal requirements. *Id.* at 1551-1552. The court did not find preempted those zoning ordinances which completely barred manufactured housing from residential zones. *Id.*

As to the Colorado court's treatment of the commerce clause issue, there is insufficient discussion of the facts found to bar summary judgment for the decision to have persuasive effect on our decision. *Id.* at 1555.

argument to distinguish *Nederland*, and conclude that there is no distinction sufficient to raise a genuine issue of material fact on its commerce clause, preemption, or equal protection claims. Accordingly, we AFFIRM the decision of the district court.

APPENDIX C — MEMORANDUM AND ORDER ON MOTION FOR RECONSIDERATION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION ENTERED AUGUST 9, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-94-1066

TEXAS MANUFACTURED HOUSING ASSOCIATION, INC.,

Plaintiff,

v.

CITY OF LA PORTE, et al.,

Defendants.

MEMORANDUM AND ORDER ON MOTION FOR RECONSIDERATION

Plaintiff Texas Manufactured Housing Association, Inc. ("Plaintiff") has filed a **Motion for Reconsideration** [Doc. # 51] ("Plaintiff's Motion") of this Court's Memorandum Opinion granting summary judgment in favor of Defendants on all of Plaintiff's claims and denying summary judgment in favor of Plaintiff.[1] Plaintiff's Motion argues strenuously that this Court

1. Specifically, Plaintiff requests that this Court vacate, alter or amend its Memorandum Opinion [Doc. # 49], as well as its Order granting Defendants' summary judgment motion [Doc. # 47], its Order denying Plaintiff's summary judgment motion [Doc. # 48], and its Final Judgment [Doc. # 50].

erred in granting summary judgment in favor of Defendants ("City" or "La Porte") on Plaintiff's claims under the Commerce Clause and on Plaintiff's argument that Ordinance 1501 of the City of La Porte is pre-empted by federal law. *See* City of La Porte Zoning Ordinance 1501 (Exhibit A-1 to Defendants' Motion for Summary Judgment [Doc. # 13]) ("Ordinance"). Plaintiff also argues that there is a fact question as to the application of rational basis review under the Due Process and Equal Protection Clauses. Since the City also has addressed this matter, the Court will reconsider its ruling in that regard as well.

For the reasons stated herein, it is now ordered that the Motion for Reconsideration is granted. It is, however, further ordered that Plaintiff's request that this Court vacate its previous Memorandum Opinion is denied. This Order supplements and clarifies the Court's prior Memorandum Opinion.

Federal Pre-emption

Plaintiff argues that summary judgment in favor of Defendants on its claim of federal pre-emption was error.[2] Specifically, Plaintiff argues that the City's motivation for excluding HUD-code manufactured homes from "R-1" districts in La Porte is "based on the City's preference for structures which are built to its local building code, including modular homes." Plaintiff's Motion, at 19.[3]

2. Plaintiff also moved for summary judgment on this claim, *see* Doc. # 46, and therefore takes the position that there are no genuine issues of material fact.

3. Neither this Order nor the pleadings in this lawsuit address the question of whether the conditions imposed on manufactured homes in La Porte's "R-2" and "R-3" districts are pre-empted.

Appendix C

The evidence cited by Plaintiff as supporting its argument concerning the City's actual motivation is as follows: first, the City allows modular homes to be placed on individual lots in "R-1" districts; second, modular homes are constructed to La Porte's building code; and third, the City's responses to Plaintiff's requests for admissions and interrogatories demonstrate that the City does not consider HUD-code manufactured homes to be as safe as modular or conventional site-built homes and specifically stated that "[m]odular/ industrialized homes are constructed to meet more stringent safety requirements than are HUD-code homes." Plaintiff's Motion, at 20-21.[4] Plaintiff asserts that this evidence "demonstrate[s] unequivocally" that the City believes that HUD-code homes, because of the building code to which they are built, are not as safe as either modular or conventional site-built homes, and therefore that "it can reasonably be concluded that HUD-code homes are being excluded from R-1 districts because of safety concerns and a preference for the local building code." *Id.* at 21.

As noted in this Court's previous Memorandum Opinion, the National Manufactured Housing Construction and Safety Standards Act, 42 U.S.C. § 5401 *et seq.*, states that

> no State or political subdivision of a State shall have any authority either to *establish, or continue in effect*, with respect to any manufactured home covered, *any standard regarding construction or safety* applicable

4. *See* City of La Porte's Responses to Plaintiffs' First Set of Interrogatories, Requests for Admissions, and Requests for Production (Exhibit M to Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment [Doc. # 17] ("Original Response")), at 16-17.

> to the same aspect of performance of such manufactured home which is not identical to the Federal manufactured home construction and safety standard.

42 U.S.C. § 5403(d) (emphasis added). Even assuming *arguendo* that, as Plaintiff urges, the City's exclusion of HUD-code homes from La Porte's "R-1" districts is based upon a belief that HUD-code homes are not as safe as other types of homes because of the building code to which they are constructed, and even if the City's belief is erroneous, such evidence simply does not demonstrate that the City, by the exclusion, has "establish[ed] or continue[d] in effect" a construction or safety standard that applies to manufactured homes.[5] Indeed, rather than establish construction or safety standards for manufactured homes, La Porte has excluded manufactured homes from its "R-1" districts.[6]

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5. *Cf. Georgia Manufactured Housing Ass'n, et al. v. Spalding County, Ga. et al.*, No. 3:94-CV-51-GET, slip op. at 18 (N.D. Ga. June 13, 1996) (attached to Plaintiff's letter to the Court, dated June 27, 1996) ("*Georgia Manufactured Housing* decision") (holding that Spalding County ordinance's 4:12 roof pitch requirement for manufactured houses is pre-empted by federal law because it interferes with the federal statute's construction and safety requirements).

6. Furthermore, Plaintiff has provided no authority to support its argument that this Court must look to an *implicit* purpose of an ordinance, such as safety regulation, in order to ascertain whether or not the ordinance is pre-empted. The case law clearly establishes that federal pre-emption of state law may occur in three ways: (1) when Congress expressly pre-empts state law; (2) when Congress legislates so comprehensively that it implies a congressional intent to pre-empt state regulation in the area; (3) when state law is displaced because of a conflict with federal law. *Hetzel v. Bethlehem Steel Corp.*, 50 F.3d 360, 363 (5th Cir. 1995); *Morgan City v. South La.*

(Cont'd)

Appendix C

Plaintiff relies heavily on an Eleventh Circuit decision holding that a town's ordinance, which required manufactured homes placed in certain zones to meet local or state building codes, was a safety requirement pre-empted by federal statute. *See Scurlock v. Lynn Haven*, 858 F.2d 1521 (11th Cir. 1988). However, the Eleventh Circuit's opinion explicitly rejected Plaintiff's contention that regulation of location of manufactured homes is pre-empted, noting that the City of Lynn Haven "[u]ndoubtedly . . . could limit Zone R-AA to conventionally-built residences and exclude mobile homes." *Id.* at 1525.

As the Court held in the previous Memorandum Opinion, La Porte's exclusion of manufactured housing from "R-1" districts, which is merely a restriction on *location* of manufactured housing, is not pre-empted by federal statute. Therefore, the Court's prior order granting summary judgment in favor of Defendants will not be vacated.

Rational Basis (Due Process and Equal Protection)

A legislature "does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." *Gregory v. Ashcroft*, 501 U.S. 452, 473 (1991) (internal

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(Cont'd)

Elec. Coop. Ass'n, 31 F.3d 319, 322 (5th Cir. 1994), *cert. denied*, 116 S. Ct. 275 (1995). Conflict pre-emption, which is the third type, may occur when either (1) a provision of state law is incompatible with a federal statute such that compliance with both is a "physical impossibility" or (2) the application of state law would disturb, interfere with, or seriously compromise the purposes of the federal statutory scheme. *Morgan City*, 31 F.3d at 322. This analysis looks to the purposes of *federal* legislation and the intent of the *federal* Congress, and does not support Plaintiff's argument that the intent of the state or local lawmakers should be considered by this Court in deciding the pre-emption question.

quotation marks and citations omitted); *see also Richard v. Hinson*, 70 F.3d 415, 417 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 2522 (1996). The Supreme Court has recently recognized that "most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Romer v. Evans*, 116 S. Ct. 1620, 1627 (1996) (citing *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 271-72 (1979)). Under the Court's rational basis test, which is applied when a classification neither burdens a fundamental right nor targets a suspect class, "a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Id.* (citing cases). The Equal Protection Clause "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices," and those challenging the rationality of a legislative classification have the burden to negate "every conceivable basis" which might support it. *Federal Communications Comm'n v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101-2102 (1993). Moreover, the absence of legislative facts explaining a classification has no significance in the rational basis analysis, since the classification "may be based on rational speculation unsupported by evidence or empirical data." *Id.* at 2102.[7]

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7. *See also Gregory*, 501 U.S. at 473 (Missouri's mandatory retirement law for some state judges does not violate Equal Protection Clause, even though it is "far from true that all judges suffer significant deterioration in performance at age 70," it is "probably not true that most do," and it "may not be true at all"; the people of Missouri "rationally could conclude that the threat of deterioration at age 70 is sufficiently great, and the alternatives for removal sufficiently inadequate, that they will require all judges to step aside at age 70"); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981) (whether *in fact* the statute achieved its purpose is not the question; Equal Protection Clause is satisfied by conclusion that legislature *could rationally have decided* that the statute might promote its purpose).

Appendix C

Under the Due Process Clause, local zoning ordinances are unconstitutional only if they are "clearly arbitrary and unreasonable, having no substantial relation to the public safety, morals, or general welfare." *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). Zoning ordinances are entitled to the same deference as state statutes, and constitutional challenges are evaluated under the rational basis test. *Horizon Concepts, Inc. v. City of Balch Springs*, 789 F.2d 1165, 1167 (5th Cir. 1986); *Shelton v. City of College Station*, 780 F.2d 475 (5th Cir.) (en banc), *cert. denied*, 477 U.S. 905 (1986).

Plaintiff's Motion, while requesting reconsideration of the Court's application of the rational basis test and referring generally to the existence of questions of fact, provides no argument on this point. The Court therefore refers to Plaintiff's original summary judgment response, in which Plaintiff argued that there is no rational basis for La Porte's differential treatment of manufactured housing.

Defendants have argued that the crucial difference between manufactured homes and industrialized homes is that "manufactured homes are designed and constructed for permanent transportability and other forms of housing, including industrialized housing, are not," and therefore that manufactured housing may lead to a decrease in property values. Defendants' Response to Plaintiff's Motion for Reconsideration [Doc. # 55] ("Defendants' Response").[8] La Porte argues, as it did in its

8. Under federal law, a manufactured home is defined as one that has a permanent chassis and is designed to be used with or without a permanent foundation. *See* 42 U.S.C. § 5402(6). By contrast, Texas law defines industrialized housing to mean a residential structure that is "designed to be used as permanent residential structure" and is composed of modules or modular components that are "erected or installed on a permanent foundation system." Tex. Rev. Civ. Stat. Ann. art. 5221f-1, § 1(1) (Vernon 1987).

original summary judgment motion, *see* Defendants' Motion for Summary Judgment [Doc. # 13] ("Original Motion"), at 4-6, that it is rational for city officials to conclude that owners of manufactured homes, "who can literally pick up their houses and move them if their neighborhood declines," will have reduced economic interest in the viability of their neighborhood and city. Defendants' Response, at 5.[9] Indeed, although Janet Stevenson, formerly a plaintiff in this action, stated in her affidavit that "[i]f [she] had been allowed to replace [her] manufactured home, [she] intended to place it on a permanent foundation which would have been bolted or welded to piers buried deep in the ground," Stevenson Affidavit (Exhibit B to Original Response), at 3, her affidavit also supported Defendant's position. Stevenson stated that one of the reasons she had chosen to live in a manufactured home was that "[i]f [she] needed to move away from the area, *[she] could take [her] home with [her]* without losing [her] investment in it" and that "[i]f in the future [she] needed a larger home or a home with more bathrooms or other features, *[she] could sell [her] manufactured home and replace it with another*." *Id.* (emphasis added).

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9. In its Response to the instant motion, the City has proffered an additional document referred to as "HUD Docket No. 92-1610 Manufactured Housing Institute's Petition for Rulemaking." *See* Exhibit 1 to Defendants' Response to Plaintiff's Motion for Reconsideration [Doc. # 55] ("Defendants' Response"). Plaintiff objects to this evidence on the grounds that it is hearsay and that it improperly supplements the summary judgment record. Plaintiff's Reply to Defendants' Response to Plaintiff's Motion for Reconsideration [Doc. # 58] ("Plaintiff's Reply"), at 1-3. Plaintiff further argues that this document, if it is considered, raises genuine issues of material fact because, according to Plaintiff, this case concerns "permanently installed, permanently sited HUD-code homes on permanent foundation systems." *Id.* at 2-3 (emphasis omitted). The Court declines to consider this document; it was submitted too late and, in any event, its relevance to the Motion is not evident.

Appendix C

Several affidavits proffered by Plaintiff assert that manufactured homes, once sited, are rarely moved.[10] These statements are not accompanied by any statistics or other data, and use vague or subjective terms of measurement. Moreover, La Porte's officials disagree. Charles Harrington, Director of Planning for the City of La Porte, stated that, "[B]ecause mobile homes are more easily transportable than other forms of residential housing, owners of mobile homes may not feel the same sense of commitment to the community and may be less likely to invest in upgrading their property through landscaping and the construction of other improvements." Affidavit of Charles Harrington (Exhibit A to Original Motion), at 2-3; *accord* Preliminary Report of Vernon G. Henry, A.L.C.P., C.R.E. [Doc. # 41], at 2 (since manufactured homes "are constructed on a permanent frame. . . . the perception (as well as the reality, in many cases) of the owner as well as neighbors is that they may well be later moved").

La Porte citizens also clearly have the perception that mobility is a factor. *See* Transcript of Public Hearing and Regular Meeting of the La Porte Zoning Board of Adjustment, March 23, 1994 (Exhibit L to Original Response), at 48-56. During the public hearing concerning Stevenson's application to place a manufactured home on her lot, four persons who own nearby homes stated that they wanted Ordinance 1501 to be upheld because they believe that mobile homes or "house trailers" devalue their property. This disagreement in itself

10. *See* Affidavit of Will Ehrle, President and General Counsel of TMHA (Exhibit E to Original Response), at 3 ("[o]n the issue of mobility, the available statistical data reveals that a substantial number of all manufactured homes are not moved from their initial place of installation"); Affidavit of Welford Sanders (Exhibit F to Original Response), at 3 (manufactured homes, once sited, "are rarely moved, and the hitch, axles, and wheels are removed").

demonstrates that the matter is "at least debatable." Thus, this Court concludes that Plaintiff has not satisfied its burden of negating every conceivable rational basis for the Ordinance's exclusion. *Federal Communications Comm'n*, 113 S. Ct. at 2101-2102.[11]

Furthermore, La Porte has proffered the appearance of manufactured homes as an additional rational basis for their exclusion from "R-1" districts. Plaintiff's response to this argument is carefully qualified:

> *[M]any* HUD-code manufactured homes built today are multi-section homes. *Although there is a broad spectrum of styles available*, there are *many* multi-section homes built today which bear a striking

11. The Court further notes that statistics about mobility provided in one of Plaintiff's experts' reports further support La Porte's rational basis. *See* City of La Porte Housing Needs (dated February 28, 1995) (attached to Affidavit of Larry Keating (Exhibit Q to Original Response)) ("Keating Report"), at 11-12. Table 5 of the Keating Report, entitled "Year Moved into Unit by Housing Characteristics," measures mobility of persons who own three types of homes: (1) single family, attached or detached, (2) manufactured home, and (3) multifamily housing. The data reports that the average length of residence for an owner-occupied single family home is 6.26 years, whereas the average for an owner-occupied manufactured home is only 4.09 years — in other words, tenure in La Porte's single family homes is, on average, 53.06% longer than tenure in the City's manufactured homes. The data in Table 5 also reflects that, out of 25,240 households in owner-occupied single family homes, 11,234 (44.51%) have been in the same housing unit since 1979 or before, whereas 14,006 (55.50%) have been in the unit since 1980 or after; by contrast, out of 1,676 households in owner-occupied manufactured homes, only 345 (22.98%) have been in the same unit since 1979 or before, and 1,291 (77.03%) have been in the unit since 1980 or after.

> resemblance to site-built homes. . . . In addition . . ., planners across the country are now stressing the important role that permanent foundation systems, landscaping, siding, and roofing can play in fostering the compatibility of manufactured housing with surrounding conventional site-built homes.

Original Response, at 25-26.[12] "[N]ew manufactured homes built today are available in a *wide range* of sizes and prices, with *varying levels* of excellence and amenities. . . . *[M]any* HUD-code homes . . . [are] compatible with, and even indistinguishable from, site-built homes." Ehrle Affidavit, at 5.

Given this "wide range" of manufactured homes, Plaintiff has not met its burden of establishing that the City has no rational basis for relying upon appearance in excluding manufactured homes from "R-1" districts. Summary judgment in favor of La Porte, therefore, is appropriate on this ground as well.

Commerce Clause

Plaintiff also moves this Court for reconsideration of its holding granting summary judgment in favor of La Porte on Plaintiff's Commerce Clause claim.[13] This Court previously held

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12. Plaintiff's emphasis on the need for features such as landscaping and other improvements undercuts its economic argument about La Porte's irrational denial of low-cost affordable housing.

13. Plaintiff originally moved for summary judgment on the Commerce Clause issue, *see* Doc. # 46, and therefore took the position that there are no genuine issues of material fact pertaining to this claim. However, Plaintiff inconsistently submitted a list of issues it contends are fact questions on the (Cont'd)

that Ordinance 1501's exclusion of manufactured homes from "R-1" districts is an evenhanded regulation with only incidental effects on interstate commerce, and that the burden on interstate commerce resulting from the Ordinance was not clearly excessive in light of the putative local benefits. Memorandum Opinion, at 17-18.[14] The Memorandum Opinion addressed the only complaint raised by Plaintiff about the ordinance, which was the exclusion of manufactured housing from "R-1" districts; no claims concerning the validity of "R-2" or "R-3" districts are before this Court.[15] For the reasons stated herein, the Court remains convinced that there are no genuine issues of material fact as to Plaintiff's claim under the Commerce Clause, and that summary judgment is appropriate in favor of La Porte.

Potentially Applicable Legal Tests. — There are two possible routes of analysis under the Commerce Clause. If an ordinance regulates evenhandedly with only incidental effects on interstate commerce, then it is valid unless the burden imposed on such commerce is clearly excessive in relation to the putative

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(Cont'd)
Commerce Clause issue. *See* Genuine Issues of Material Fact (Exhibit A to Plaintiff's Motion), at 10. None of these purported issues raise genuine questions of material fact. Most are legal questions. The rest are either not "material" or not established by the record to be genuine fact questions.

14. The district court in the Georgia action, ruling on Commerce Clause challenge to a similar zoning ordinance, reached the same conclusion. *Georgia Manufactured Housing* decision, *supra* note 5, slip op. at 20-21.

15. Plaintiff's pleadings complain only of the Ordinance's exclusion of manufactured housing from "R-1" districts. *See* Complaint and Petition for Writ of Certiorari and for Permanent Injunctive Relief [Doc. # 1]. Presumably, this is because Janet Stevenson, the only individual plaintiff in this action, had not been permitted to put a manufactured home on her lot, which had been zoned "R-1."

local benefits. *Oregon Waste Systems v. Department of Environmental Quality*, 114 S. Ct. 1345, 1350 (1994); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). This flexible approach, often referred to as "the *Pike* test," is available only " 'where other legislative objectives are credibly advanced *and* there is *no* patent discrimination against interstate trade.' " *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009, 2014 n.5 (1992) (emphasis original) (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)). If, on the other hand, an ordinance discriminates against interstate commerce or its effects favor in-state economic interests at the expense of out-of-state interests, the statute is unconstitutional unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism. *Fort Gratiot Landfill v. Mich. Dep't of Natural Resources*, 112 S. Ct. 2019, 2024 (1992); *Wyoming v. Oklahoma*, 112 S. Ct. 789, 800 (1992); *Cooper v. McBeath*, 11 F.3d 547, 553 (5th Cir.), *cert. denied*, 114 S. Ct. 2675 (1994). When an ordinance discriminates against interstate commerce, either on its face or in its effect, it is therefore subject to stricter scrutiny: the city must show that the ordinance advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. *Oregon Waste*, 114 S. Ct. at 1351; *Fort Gratiot*, 112 S. Ct. at 2027.

Determination of Appropriate Legal Test. — In order to decide which of the above tests to apply, this Court must determine, as stated in the previous Memorandum Opinion, at 17, whether Ordinance 1501 regulates evenhandedly with only incidental effects on interstate commerce, or whether it discriminates against interstate commence.[16] *See Fulton Corp.*

16. Plaintiff does not argue that the Ordinance is facially discriminatory against interstate commerce; Plaintiff argues instead that the Ordinance is discriminatory in its effect.

v. Faulkner, 116 S. Ct. 848, 854 (1996). The Supreme Court has recognized that there is no "clear line" separating legislation that is subject to the stricter standard and that subject to the flexible *Pike* analysis. *Chemical Waste*, 112 S. Ct. at 2014 n.5; *Brown-Forman Distillers v. New York State*, 476 U.S. 573, 579 (1986).

Plaintiff's Motion argues strenuously that the Ordinance 1501's exclusion of manufactured homes from "R-1" districts creates a discriminatory effect on interstate commerce, and therefore that stricter scrutiny must be applied. It is Plaintiff's burden to show that the Ordinance discriminates against interstate commerce, so as to warrant stricter scrutiny. *See Hughes*, 441 U.S. at 336.

Plaintiff's Motion makes several arguments in support of reconsideration. First, Plaintiff argues that this Court erred "by holding that discrimination with only a limited effect on interstate commerce is not actionable under the Dormant Commerce Clause." Plaintiff's Motion, at 6. Plaintiff misstates this Court's holding, which was not that the Ordinance was discriminatory with only "limited effects" on interstate commerce, but rather that it was an evenhanded regulation with incidental effects.[17] While the Supreme Court's teachings indeed

17. Much of Plaintiff's argument for reconsideration flows from this Court's prior statement that "Ordinance 1501 regulates evenhandedly and that, since HUD-code manufactured homes may flow freely into La Porte, there is only an incidental effect, if any, on interstate commerce." Memorandum Opinion, at 17. This sentence, though perhaps unartfully drafted, did not hold that the more flexible *Pike* analysis applied *because* of the ordinance's limited effect on interstate commerce. Rather, as clarified in this Order, the Court holds that the *Pike* analysis applies because Ordinance 1501 is an evenhanded zoning regulation with only incidental effects on interstate commerce.

do state that the *amount* of discrimination is irrelevant, once discrimination is established, Plaintiff has not met its initial burden of establishing that the Ordinance is in fact discriminatory.[18] Plaintiff's argument has bypassed the threshold question: Is Ordinance 1501 an evenhanded regulation with incidental effects on interstate commerce, rather than a discriminatory measure?[19]

Second, Plaintiff argues that this Court improperly weighed the evidence when assessing the effects of the Ordinance's contested provision. Plaintiff's Motion for Reconsideration points out to the Court for the first time that "R-1" districts comprise a large percentage of the residential area of La Porte. City of La Porte Zoning Map (attached to Supplemental Report of Waldo S. Luedemann, Jr. (attached to Affidavit of Waldo S. Luedemann, Jr. (Exhibit P to Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment [Doc. # 17])))) ("Zoning Map"). Furthermore, although manufactured housing is permitted in La Porte's "R-2" and "R-3" districts, certain conditions are imposed before it can be placed there. Ordinance

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18. As Plaintiff correctly points out, the volume of commerce affected by the ordinance has no relevance to the determination of whether or not the ordinance is discriminatory. *See, e.g., Wyoming*, 112 S. Ct. at 801 ("[t]he volume of commerce affected measures only the *extent* of the discrimination; it is of no relevance to the determination whether a State has discriminated against interstate commerce") (emphasis original). However, the Court notes that the *Wyoming* Court also held that the statute in question was discriminatory on its face and in its effect, and therefore that the stricter scrutiny test was appropriate. *Id.*

19. Plaintiff also blurs the concept of "discriminatory effect" with that of a "burden" on interstate commerce. While discriminatory effect is prohibited, a burden on interstate commerce is not necessarily unconstitutional. *See infra* at 15-16.

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(Exhibit A-1 to Defendants' Original Motion) § 5-600, at 32-33. The "MH" district — the only district in which manufactured housing may be placed without restriction — is a very small percentage of the City's residential area. *See* Zoning Map. By contrast, industrial (or modular) homes are permitted in all residential zones of La Porte, although the Ordinance specifies that the housing must be on a permanent foundation system. Ordinance, 5-600, at 32.[20] Plaintiff alleges that industrialized homes are manufactured exclusively in Texas,[21] and therefore

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20. Although this evidence now relied upon by Plaintiff was included among the voluminous exhibits filed with the original summary judgment papers, it was not discussed or referred to in the briefing. *See Jones v. Sheehan, Young & Culp, P.C.*, 82 F.3d 1334, 1338 (5th Cir. 1996) (Rule 56 "saddles the non-movant with the duty to 'designate' the specific facts in the record that create genuine issues precluding summary judgment, and does not impose upon the district court a duty to survey the entire record in search of evidence to support a non-movant's opposition"). Plaintiff's prior summary judgment briefing — including Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment [Doc. # 17], Plaintiff's Supplemental Response in Opposition to Defendants' Motion for Summary Judgment [Doc. # 43], and Plaintiff's Motion for Partial Summary Judgment [Doc. # 46] — did not mention the relative sizes of La Porte's various residential districts or the conditions placed on manufactured homes in "R-2" and "R-3" districts. Nor does the briefing identify the Zoning Map, which is buried among Plaintiff's numerous exhibits as one of many attachments to Luedemann's various affidavits and reports, all of which were filed together as Exhibit P.

21. Defendant points out that Texas law permits industrialized housing to be built in other states, and that industrialized housing must meet or exceed certain national building codes. Defendants' Response, at 6; *see* Tex. Rev. Civ. Stat. Ann. art. 5221f-1, §§ 2(a) & 4(c) (Vernon 1987 & Supp. 1996). There is no reason why industrialized homes (which are modular, *i.e.*, built in prefabricated pieces and then assembled on-site), could not be transported across state lines. See Tex. Rev. Civ. Stat. Ann. art. 5221f-1, § 1(1) (Vernon 1987). Nor is there any indication that manufactured homes are not being constructed in Texas.

argues that the Ordinance is discriminatory against out-of-state interests who produce manufactured homes and that the magnitude of the Ordinance's effect on interstate commerce should not be analyzed. Plaintiff's Motion, at 14-16.

Plaintiff's evidence about the relative size of La Porte's residential districts and the conditions on manufactured homes placed in "R-2" and "R-3" districts may indicate that La Porte's exclusion of manufactured homes from "R-1" districts has a perceptible effect on interstate commerce.[22] The Court need not and does not decide this issue, however. Even assuming a perceptible burden on interstate commerce, it does not necessarily follow that Ordinance 1501 is impermissibly discriminatory

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22. *See* The Effects of Zoning on New Manufactured Housing Sales (attached to Affidavit of Gordon Otto (Exhibit O to Original Response)), at § C (total lost sales attributed to La Porte's restrictive zoning is $1,720,097 in 1994); Supplemental Report of Gordon H. Otto (Exhibit B to Supplemental Disclosure of Experts [Doc. # 23]), at § 6 (almost three times as many manufactured homes were installed in Vidor, which does not restrict their placement, than in La Porte, despite the fact that La Porte has almost 2.5 times as many households).

Plaintiff's proof is extremely weak. The statements made in the submitted reports are vague, largely unquantified and unpersuasive. There are many variables that would need to be analyzed to ascertain conclusively whether in fact there was an identifiable and statistically significant impact on interstate commerce resulting from the prohibition of manufactured homes from a segment of a single city, La Porte, amounting to less than ten (10) square miles of land. *See* Leudemann Affidavit (Exhibit P to Original Response), at 9 (La Porte encompasses an area of 18.33 square miles); Zoning Map (approximately 50% of La Porte is zoned "R-1"). One variable, for example, is whether people in any numbers in fact want to move manufactured homes into the R-1 districts. Moreover, the Court cannot ascertain on this record whether a single comparison with the City of Vidor is demographically or socio-economically relevant.

against interstate commerce, and therefore can trigger stricter scrutiny. Rather, "the real question is whether the [challenged legislative action] is valid *despite its undoubted effect on interstate commerce*," and for this inquiry, it must be determined whether to apply the *Pike* analysis or stricter scrutiny. *See C & A Carbone*, 114 S. Ct. at 1682 (emphasis added); *see also Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 36 (1980) ("in the absence of conflicting federal legislation, the States retain authority under their general police powers to regulate matters of 'legitimate local concern,' *even though interstate commerce may be affected*") (emphasis added). Indeed, in *Clover Leaf*, a case factually analogous to the one at bar, the Supreme Court noted that a state statute burdened interstate commerce, but nevertheless applied the *Pike* test in order to determine whether or not the statute was unconstitutional. *Clover Leaf*, 449 U.S. at 472-73.[23]

Upon reconsideration, viewing all evidence in the light most favorable to Plaintiff, the Court again holds that application of stricter scrutiny is not warranted. La Porte's exclusion of manufactured homes from "R-1" districts is an evenhanded zoning regulation. Other cases analyzing Commerce Clause challenges to zoning ordinances have reached the same conclusion, and have applied the *Pike* test.

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23. Plaintiff also argues that this Court's decision was in error because it "suggests that La Porte can avoid a finding of discrimination simply by demonstrating accommodation in certain geographic areas." Plaintiff's Motion, at 5; *see Fort Gratiot*, 112 S. Ct. at 2024 ("a State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself"). However, La Porte avoids such a finding not because only portions of the City are affected by the exclusion, but rather because, as stated herein, Ordinance 1501 is an evenhanded zoning regulation and its effects are merely incidental to the Ordinance's application.

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The First Circuit recently rejected a Commerce Clause challenge to a "cease and desist" order issued by the town of Plaistow, New Hampshire, which prohibited heavy commercial trucking traffic to and from the town terminal in the late night hours. The town's order imposed the nighttime restrictions because of the "odors, smoke, fumes, noise and vibration" resulting from the traffic, and was issued pursuant to a zoning ordinance which prohibited "uses that may be obnoxious or injurious by reason of the production or emission of odors, dust, smoke, refuse matter, fumes, noise, vibration or other similar conditions, or that are dangerous to the comfort, peace, enjoyment, health or safety of the community." *New Hampshire Motor Transport Ass'n v. Town of Plaistow*, 67 F.3d 326, 327-28 (1st Cir. 1995), *cert. denied*, 116 S. Ct. 1352 (1996). The Court concluded without difficulty that the case did not involve discrimination against interstate commerce, and proceeded to hold, under the *Pike* test, that the burdens on interstate commerce created by the time restrictions were not clearly excessive to the benefits conferred on the town's citizens, noting that the curfew was "akin to zoning and traffic restrictions traditionally applied on a local level." *Id.* at 332-33.

Similarly, the Tenth Circuit, in evaluating a Commerce Clause challenge to a county's hazardous waste zoning ordinance, held that the ordinance's site conditions had to be evaluated under the *Pike* test, rather than the stricter test "reserved for statutes that explicitly, or by application, discriminate based upon the origin of the article of commerce," because the site conditions applied equally to hazardous waste generated within the county and outside the county, and "confer[red] no advantages on in-state entities seeking to store, treat, recycle, or dispose of [hazardous waste] as against out-of-state firms." *Blue Circle Cement, Inc. v. Board of County*

Commissioners, 27 F.3d 1499, 1511-12 (10th Cir. 1994). *See also Old Bridge Chemicals, Inc. v. New Jersey Dep't of Environmental Protection*, 965 F.2d 1287, 1294 (3d Cir.), *cert. denied*, 506 U.S. 1000 (1992) (*Pike* analysis applied to evaluate Commerce Clause challenge to New Jersey's statutory definition of "solid waste," which was more expansive and stringent than federal definition and therefore caused certain waste in interstate shipment to be subject to federal hazardous waste regulations); *Wood Marine Serv., Inc. v. City of Harahan*, 858 F.2d 1061, 1064-65 (5th Cir. 1988) (zoning ordinance, which restricts private commercial development on portion of riverbank, does not discriminate against interstate commerce; ordinance is directed at local landowners alone, and its purpose is not to favor local economy but to stop further commercial development within city's boundaries).[24]

Plaintiff has cited the Court to no cases in which stricter scrutiny under the Commerce Clause was applied to a zoning ordinance. This Court declines to be the first.

Ordinance 1501 bans *all* manufactured homes, whether constructed in Texas or elsewhere, from "R-1" districts. An incidental effect of this regulation is that the placement in La Porte of industrialized homes, which are not similarly banned from "R-1" districts, is less restricted than the placement of manufactured homes. Plaintiff argues that La Porte's restriction on the location of manufactured houses impermissibly favors the Texas industrialized housing industry. However, in *Clover*

24. The Fifth Circuit held in *Wood Marine* that the zoning ordinance at issue created *no* burden on interstate commerce. *Wood Marine*, 858 F.2d at 1065. Similarly, the Court is unconvinced that the exclusion of manufactured homes from "R-1" districts creates a burden on interstate commerce. *See supra* at 15-16.

Leaf, the Supreme Court rejected a similar argument in an analogous setting. The Court held that although the Minnesota pulpwood industry stood to gain from the statute's ban on plastic nonreturnable bottles, the statute nevertheless was an evenhanded regulation because it applied without regard to whether the milk, the containers, or the sellers came from inside or outside Minnesota. *Id.* In La Porte, manufactured housing is banned from "R-1" districts, regardless of the origin of the housing.[25] The advantage to Texas' industrialized housing industry, like that to Minnesota's pulpwood industry, is an incidental effect of this evenhanded regulation.

Where legislative objectives other than economic protectionism are "credibly advanced" and there is no "patent discrimination" against interstate trade, the courts are to apply the more flexible *Pike* test. *Chem Waste*, 112 S. Ct. at 2014 n.5 (citing *Philadelphia*, 437 U.S. at 624); *SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 509-10 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 911 (1996); *SDDS, Inc. v. State of South Dakota*, 47 F.3d 263, 269 (8th Cir. 1995); *GSW, Inc. v. Long County*,

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25. In *C & A Carbone*, the Supreme Court stated that a town's flow control ordinance requiring all nonhazardous solid waste within a town, regardless of its origin, to be deposited at a certain transfer station (and thereby favoring one operator) was "no less discriminatory" because in-state or in-town processors were also disadvantaged by the ordinance. *C & A Carbone*, 114 S. Ct. at 1682. This statement, of course, does not suggest that this Court may not consider, as evidence of Ordinance 1501's evenhandedness, the fact that both in-state and out-of-state manufactured homes are banned from "R-1" districts. Indeed, as noted above, the *Clover Leaf* Court looked to analogous evidence. Moreover, whereas the Supreme Court in *C & A Carbone* held that the flow control ordinance was discriminatory because "it allow[ed] only the favored operator to process waste that is within the limits of the town," *id.*, no such favoritism or discrimination is involved in the case at bar.

Ga., 999 F.2d 1508, 1516 (11th Cir. 1993). This is such a case. La Porte has credibly advanced legislative objectives other than economic protectionism for the Ordinance's exclusion of manufactured homes from "R-1" districts — namely, preservation of property values. *See supra* at 5-10 (rational basis discussion). Whereas cases applying stricter scrutiny typically involve situations in which the basis for differential treatment of in-state and out-of-state goods is the origin of those goods,[26] the contested provision of La Porte's Ordinance 1501 does not distinguish between manufactured homes and industrialized homes based on their respective origins. The exclusion of manufactured homes from "R-1" districts is not "basically a protectionist measure," but "can fairly be viewed as a law directed

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26. *See, e.g., Oregon Waste Systems v. Dep't of Environmental Quality*, 114 S. Ct. 1345, 1349-50 (1994) (Oregon surcharge imposed on waste generated out-of-state patently discriminates against interstate commerce, because the statutory determinate for the fee is the origin of the waste); *Chem Waste*, 112 S. Ct. at 2014-15 (Alabama's additional fee for disposal of hazardous waste is imposed only on waste generated outside state, and therefore discriminates against interstate commerce); *Fort Gratiot*, 112 S. Ct. at 2026-27 (waste import restrictions of Michigan statute, which provide that solid waste generated in another county, state or country cannot be accepted for disposal unless explicitly authorized by receiving county, discriminate against interstate commerce; there is no valid health and safety reason for limiting the amount of waste received from outside the state, but not the amount received from inside the state); *Wyoming v. Oklahoma*, 502 U.S. 437, 455 (1992) (Oklahoma statute requiring coal-fired electric utilities to burn mixture containing at least 10% Oklahoma-mined coal is discriminatory, because statute purports to exclude coal mined in other states based solely on its origin). *Cf. Maine v. Taylor*, 477 U.S. 131 (Maine statute prohibiting importation of live baitfish is discriminatory against interstate commerce because out-of-state baitfish are banned based on their origin; however, since nonnative species pose serious threat to native fish, Maine had legitimate reasons, apart from origin of out-of-state baitfish, for differential treatment).

to legitimate local concerns, with effects upon interstate commerce that are only incidental." *Philadelphia*, 437 U.S. at 624. The Court holds that Plaintiff has not met its burden to show that Ordinance 1501 discriminates against interstate commerce.

Application of the *Pike* Test. — The only remaining question is, therefore, whether the incidental burden placed on interstate commerce by the exclusion from "R-1" districts is "clearly excessive" to the putative local benefits. *Pike*, 397 U.S. at 142. The Supreme Court has stated that "[a] nondiscriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from a predominantly out-of-state industry to a predominantly in-state industry," but is only invalid "if the burden on interstate commerce clearly outweighs the State's legitimate purposes." *Clover Leaf*, 449 U.S. at 474.

A municipality such as La Porte clearly has the power impose zoning restrictions, even should interstate commerce be affected. Generally, " 'there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it.' " *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 350 (1977) (quoting *Southern Pacific Co. v. Arizona, ex. rel. Sullivan*, 325 U.S. 761, 767 (1945)); *see supra* at 17-19 (discussing Commerce Clause challenges to zoning ordinances). Zoning is a well-established as a valid exercise of local government's police power. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926); *SDJ, Inc. v. City of Houston*, 837 F.2d 1268, 1278 (5th Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989). As with

other traditional areas of local regulation, La Porte's zoning decisions must be afforded considerable deference.[27]

La Porte's exclusion of manufactured housing from "R-1" districts serves the legitimate municipal goal of preservation of property values. As noted previously, Plaintiff has presented some evidence that there may be a burden on interstate commerce resulting from La Porte's exclusion of manufactured homes from "R-1" districts. *See supra* note 22 and accompanying text. However, as a matter of law, this alleged burden, even if accepted as true, does not "clearly exceed" the substantial local benefits that result from the challenged provision of Ordinance 1501, especially when the City's zoning decisions are given their due deference.[28]

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27. *See Wood Marine*, 858 F.2d at 1066 (zoning decisions entitled to great deference); *Star Satellite, Inc. v. City of Biloxi*, 779 F.2d 1074, 1079 (5th Cir. 1986) (zoning decisions afforded considerable deference). *See also Old Bridge Chemicals*, 965 F.2d at 1291 (legislation in areas of peculiarly strong state interest is subject to "very deferential review" under Commerce Clause); *Juzwin v. Asbestos Corp.*, 900 F.2d 686, 689 (3d Cir.), *cert. denied*, 498 U.S. 896 (1990) (same); *Burlington Northern Railroad Company v. Nebraska*, 802 F.2d 994, 999 (8th Cir. 1986) (state power to regulate commerce is greatest when state acts on matters of local concern); *L & L Started Pullets, Inc. v. Gourdine*, 592 F. Supp. 367, 374 (S.D.N.Y. 1984) (Sofaer, J.) (state regulations that affect interstate commerce are presumptively valid where they are exercises of traditional police powers), *aff'd*, 762 F.2d 1 (2d Cir. 1985). As the Supreme Court has stated, the factfinder in a Commerce Clause dispute "certainly [is] not authorize[d] . . . to resolve conflicts in the evidence against the legislature's conclusion or even to reject the legislative judgment on the basis that without convincing statistics in the record to support it, the legislative viewpoint constitutes nothing more than . . . 'pure speculation'." *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pacific R.R. Co.*, 393 U.S. 129, 139 (1968).

28. The extent of the burden on interstate commerce that will be

(Cont'd)

Appendix C

In interpreting the Commerce Clause, courts consistently have been guided by the principle that "economic protectionism" between the several states, whether in legislation's purpose or only in its effects, is prohibited. *See C & A Carbone*, 114 S. Ct. at 1682 ("[t]he central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent"); *see also Fulton Corp. v. Faulkner*, 116 S. Ct.

(Cont'd)

tolerated by the Constitution depends on " 'the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate commerce.' " *Clover Leaf*, 449 U.S. at 471 (quoting *Pike*, 397 U.S. at 142). Plaintiff has made several proposals for alternative zoning provisions that would have a "lesser impact" on interstate commerce. However, Plaintiff's proposals are not adequate. Plaintiff proposes (1) a requirement that all manufactured homes in "R-1" districts be installed on permanent foundation systems, and (2) achieving uniformity of appearance "by requiring all homes to have minimum square footage, pitched roofs, conventional siding and roofing, and the like." Plaintiff's Original Response, at 35-36. However, Janet Stevenson's affidavit states that, even though she planned to install her manufactured home on a "permanent foundation which would have been bolted or welded to piers buried deep in the ground," she also valued the option of moving her home later. Stevenson Affidavit (Exhibit B to Original Response), at 3. This evidence belies Plaintiff's argument that transience could be defeated by permanent foundation systems. Moreover, Plaintiff's proposal for "uniformity" is unspecific and thus legally insufficient. Also, some appearance requirements may be argued to involve "construction standards" which might be attacked on pre-emption grounds under the federal statute regarding HUD-code manufactured homes, 42 U.S.C. § 5401 *et seq.* *See, e.g., Georgia Manufactured Housing* decision, *supra* note 5, slip op. at 18 (holding that Spalding County ordinance's 4:12 roof pitch requirement for manufactured houses is pre-empted by federal law because it interferes with the federal statute's construction and safety requirements); *see also supra* at 2-5 (discussion of federal pre-emption).

848, 853 (1996) ("[i]n its negative aspect, the Commerce Clause prohibits economic protectionism — that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors") (internal quotation marks and citations omitted). This is not a case that implicates such protectionism. Rather, La Porte has enacted a zoning ordinance which distinguishes between different types of housing, without regard to their origins. Such legislation is well within the traditional local powers of municipalities, and its incidental effects on interstate commerce, assuming that these effects in fact exist, do not clearly exceed the benefits to the La Porte community.

Upon reconsideration, La Porte's Motion for Summary Judgment on Plaintiff's Commerce Clause claim is again granted.[29]

CONCLUSION

For the reasons stated herein, it is

ORDERED that the **Motion for Reconsideration** [Doc. # 51] is **GRANTED**. It is, however,

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29. Even if the Court were to apply the stricter scrutiny test, it appears that this result would not change. Plaintiff has presented no evidence that La Porte was motivated by economic protectionism when it enacted Ordinance 1501 excluding manufactured homes from "R-1" districts. *See Philadelphia*, 437 U.S at 626 (protectionism can reside either in legislative means or legislative ends). Furthermore, even assuming *arguendo* that Plaintiff had demonstrated discriminatory effect, La Porte has demonstrated that the exclusion of manufactured homes from "R-1" districts is justified by "a valid factor unrelated to economic protectionism" — namely, preservation of property values. *See Fort Gratiot*, 112 S. Ct. at 2024; *Cooper*, 11 F.3d at 553.

Appendix C

FURTHER ORDERED that Plaintiff's request that this Court's vacate its previous Memorandum Opinion is **DENIED**.

SIGNED at Houston, Texas this 8th day of August, 1996.

s/ Nancy F. Atlas
NANCY F. ATLAS
UNITED STATES DISTRICT JUDGE

APPENDIX D — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION ENTERED APRIL 2, 1996

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CIVIL ACTION NO. H-94-1066

TEXAS MANUFACTURED HOUSING ASSOCIATION, INC.,

Plaintiff,

v.

CITY OF LA PORTE, et al.,

Defendants.

MEMORANDUM OPINION

Plaintiff Texas Manufactured Housing Association, Inc. (hereinafter "TMHA")[1] brings this action against the City of

1. An organization such as TMHA has standing to bring an action on behalf of its members where: (1) the organization's members would have standing to sue individually; (2) the organization is seeking to protect interests that are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires the organization's members to participate in the lawsuit. *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 555 (5th Cir. 1996). Defendants have not objected to TMHA's standing. Based upon TMHA's representations in its complaint concerning the activities of its members and the purpose of its organization, the Court is satisfied that TMHA has standing to bring this action.

(Cont'd)

Appendix D

La Porte (hereinafter "La Porte" or "City") and the Zoning Board of Adjustment of the City of La Porte (hereinafter "ZBA"), arguing that La Porte's zoning scheme excludes manufactured homes in a discriminatory and unconstitutional manner. Plaintiff raises a myriad of constitutional arguments, as well as federal and state preemption arguments, and asks that Defendants be permanently enjoined and restrained from applying or enforcing Ordinance 1501 of the City of La Porte. For the reasons stated below, Defendants' **Motion for Summary Judgment** [Doc. # 13] is **GRANTED** and Plaintiff's **Request for a Permanent Injunction** [Doc. # 1] is **DENIED.**[2]

On March 28, 1996, Plaintiff filed a **Motion for Partial Summary Judgment** [Doc. # 46], requesting summary judgment on the issues of the commerce clause and federal and state preemption. Since this motion essentially repeats the arguments made in Plaintiff's Response to Defendants' Motion for Summary Judgment, it is not necessary for the Court to wait for Defendants' response. The arguments in Plaintiff's motion will be addressed together with the issues raised by Defendants' motion.

SUMMARY JUDGMENT STANDARD

In deciding a motion for summary judgment, the Court

(Cont'd)

Janet Stevenson was originally a Plaintiff in this action. However, the Court has been notified by a letter from Stevenson's counsel dated March 15, 1996, that all claims urged by Stevenson against the Defendants have been settled.

2. Plaintiff's request that this Court issue a writ of certiorari to the Zoning Board of Adjustment of the City of La Porte has been previously denied. *See* Doc. # 38.

must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc); *Bozé v. Branstetter*, 912 F.2d 801, 804 (5th Cir. 1990). The facts are to be reviewed with all inferences drawn in favor of the party opposing the motion. *Bozé*, 912 F.2d at 804 (citing *Reid v. State Farm Mut. Auto Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986). However, factual controversies are resolved in favor of the non-movant "only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts." *McCallum Highlands, Ltd. v. Washington Capital Dus, Inc.*, 66 F.3d 89, 92 (5th Cir.), *revised on other grounds upon denial of reh'g*, 70 F.3d 26 (5th Cir. 1995).

The party moving for summary judgment has the initial burden of demonstrating the absence of a material fact issue with respect to those issues on which the movant bears the burden of proof at trial. For any matter on which the non-movant carries the burden of proof at trial, however, the movant may, by merely pointing to the absence of evidence supporting the essential elements of the non-movant's case, shift to the non-movant the burden of demonstrating by competent summary judgment proof that there is an issue of material fact so as to warrant a trial. *Transamerica Ins. Co. v. Avenell*, 66 F.3d 715, 718-19 (5th Cir. 1995); *Douglass v. United Servs. Auto. Ass'n*, 65 F.3d 452, 459 (5th Cir. 1995), *revised on other grounds*, No. 95-50007, 1996 WL 140173 (5th Cir. March 28, 1996) (en banc); *Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir.), *cert. denied*, 115 S. Ct. 195 (1994).

The nonmovant's burden may not be satisfied by conclusory allegations, unsubstantiated assertions, metaphysical doubt as to the facts, or a scintilla of evidence. *Douglass*, 65 F.3d at 459; *Little*, 37 F.3d at 1075. In the absence of any proof, the court will not assume that the nonmovant could or would prove the necessary facts. *McCallum Highlands*, 66 F.3d at 92; *Little*, 37 F.3d at 1075 (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990)). Rule 56 mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a sufficient showing of the existence of an element essential to the party's case, and on which that party will bear the burden at trial. *Little*, 37 F.3d at 1075 (citing *Celotex*, 477 U.S. at 322).

FACTUAL BACKGROUND

The City of La Porte has adopted Ordinance 1501, which regulates the zoning of real property situated within the corporate limits of the city. Under Ordinance 1501, the City is classified into residential zoning districts R-1, R-2, R-3, and MH. The ordinance provides that manufactured homes of any type are not permissible uses of property in the R-1, or "Low Density Residential," districts. "Industrialized" or "modular" homes,[3] in addition to conventional "site-built" homes, are permitted in R-1 districts. Plaintiff contends that the "only difference or distinction" between industrialized homes and HUD-code manufactured homes is "the building code to which they are constructed." Plaintiff further argues that some

3. The term "modular" home has the same meaning as "industrialized" home, which is defined by Texas statute. Tex. Rev. Civ. Stat. Ann. art. 5221f-1 (Vernon 1987 & Supp. 1996). Modular or industrialized homes are referred to as "blue label" homes, while HUD-code manufactured homes are called "red label" homes. Complaint, at 8.

manufactured homes are virtually identical to industrialized or site-built homes in appearance, design, function, and safety.

Janet Stevenson, formerly a plaintiff in this action, had placed and occupied a manufactured home on property which the City of La Porte annexed in 1989. As a result of the annexation, Stevenson's property became classified as R-1, but her manufactured home was allowed to remain on the property as a lawful non-conforming structure under Ordinance 1501's grandfather clause. After Stevenson's manufactured home was destroyed by fire on September 18, 1993, she applied to the City for a building permit to install a replacement HUD-code manufactured home on her property, but the City denied the permit under Ordinance 1501. *See* Exhibit A to Complaint. On or about March 24, 1994, the ZBA affirmed the City's decision.

Plaintiff alleges that the City's "obsolete and uninformed view of HUD-code manufactured housing detrimentally impacts the consumer-citizens of La Porte," as well as "the trade and commerce in manufactured housing among its various manufacturers and retailers," because their housing needs have not been given any "studied consideration." Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment [Doc. # 17] (hereinafter "Response"), at 2.

DISCUSSION

Plaintiff has raised claims pursuant to substantive due process, equal protection, the commerce clause, procedural due process, the right to privacy, and the Civil Rights Act of 1871. Plaintiff also argues that Ordinance 1501 is preempted by federal and state law. The Court notes preliminarily that TMHA's claims in this lawsuit are strikingly similar to those made in a separate

suit filed by TMHA in the Beaumont Division of the Eastern District of Texas, in which Judge Cobb granted summary judgment in favor of Defendants as to all of TMHA's claims and dismissed the complaint. *See Texas Manufactured Hous. Ass'n v. City of Nederland*, 905 F. Supp. 371 (E.D.Tex. 1995).

Substantive Due Process

Zoning ordinances are within the police power of municipalities, and review by the courts is extremely limited. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926). Local zoning ordinances violate the due process clause only if they are "clearly arbitrary and unreasonable, having no substantial relation to the public safety, morals, or general welfare." *Id.* at 395. Indeed, zoning ordinances are entitled to the same deference as state statutes, and constitutional challenges are evaluated under the rational basis test. *Horizon Concepts, Inc. v. City of Balch Springs*, 789 F.2d 1165, 1167 (5th Cir. 1986); *Shelton v. City of College Station*, 780 F.2d 475 (5th Cir.) (en banc), *cert. denied*, 477 U.S. 905 (1986). Therefore, the ordinance must be upheld if it bears a reasonable relation to a legitimate state purpose. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124-25 (1978). In order to ultimately prevail, Plaintiff must show that the legislative facts on which the regulation is apparently based could not reasonably be conceived to be true by the governmental decision maker. *Vance v. Bradley*, 440 U.S. 93, 111 (1979).

TMHA argues that the City lacks a rational basis for its regulation of manufactured housing. The City has stated that the purpose of the ordinance is preservation of property values.[4]

4. Defendants' Motion for Summary Judgment [Doc. # 13] (hereinafter "Summary Judgment Motion"), at 6.

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Charles Harrington, Director of Planning for the City of La Porte, states in his affidavit that, in his professional opinion, "the placement of mobile homes in a neighborhood of conventional or industrialized housing tends to reduce the market value of the industrialized and conventional housing, to discourage the construction of additional industrialized or conventional housing, and to reduce the incentive of property owners to improve and upgrade their property." Affidavit of Charles R. Harrington (Exhibit A to Summary Judgment Motion) (hereinafter "Harrington Affidavit"), at 3.[5] Harrington further states that he believes his opinion is shared by "many other city planners," and that, in his experience, "most people view mobile homes as an inferior form of housing." *Id.* Indeed, Plaintiff's own evidence reveals that, during the public hearing concerning Ms. Stevenson's application to place a manufactured home on her lot, four persons who own homes near Ms. Stevenson's lot spoke and all stated that they wanted Ordinance 1501 upheld because they believe that mobile homes or "house trailers" devalue their property.[6]

Defendants proffer several rational bases for Ordinance 1501's restriction on the location of manufactured homes. First, both mobile homes and HUD-code manufactured homes are constructed on a permanent chassis, and therefore can be more easily relocated. Vernon Henry, president and chairman of the

5. Plaintiff has objected to the Harrington Affidavit and asks that it be stricken in whole or in part, because it is based on belief rather than personal knowledge and because it contains improper "expert" opinion. Response, at 12-13. The Court finds this attack unpersuasive and holds that the Harrington Affidavit is admissible in support of Defendants' summary judgment motion.

6. Transcript of Public Hearing and Regular Meeting of the La Porte Zoning Board of Adjustment, March 23, 1994 (Exhibit L to Response) (hereinafter "ZBA Transcript"), at 48-56.

urban planning firm which assisted La Porte with updates of its comprehensive zoning plan, states that the ability for manufactured homes to be moved creates "the perception (as well as the reality, in many cases) of the owner as well as the neighbors . . . that they may well be later moved." Preliminary Report of Vernon G. Henry, A.I.C.P., C.R.E. [Doc. # 41] (hereinafter "Henry Report"). Mr. Henry states that this mobility results in an uncertainty which, in combination with other factors, depreciates neighboring property values. *Id.* This opinion is echoed by Harrington, who states that owners of transportable homes "may not feel the same sense of commitment to the community and may be less likely to invest in upgrading their property through landscaping and the construction of other improvements." Harrington Affidavit, at 2-3.[7]

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7. TMHA responds that this argument is a red herring, since Ms. Stevenson's proposed home was to have been placed on a permanent foundation system "which would have been bolted or welded to piers buried deep in the ground," and the City has allowed site-built homes to be taken up off their foundations and transported. Plaintiff's Supplemental Response in Opposition to Defendants' Motion for Summary Judgment [Doc. # 43] (hereinafter "Plaintiff's Supplemental Response"), at 8-9; Affidavit of Janet A. Stevenson (Exhibit B to Response), at 3; Deposition of Mark S. Lewis, Chief Building Official for City of La Porte (Exhibit J to Response), at 137-38. TMHA also argues that manufactured homes are rarely moved and therefore that the ordinance does not in fact serve to reduce transience. Plaintiff's Supplemental Response, at 8; Affidavit of Welford Sanders (Exhibit F to Response), at 3.

Even assuming that these arguments are accurate, they are not sufficient to invalidate the rational basis proffered by Defendants. The Supreme Court has stated clearly that, under the rational basis test, perfection in classification is not required; indeed, imperfection in classification is in turn rationally related to the secondary objective of legislative convenience. *Vance*, 440 U.S. at 108-09; *Horizon Concepts*, 789 F.2d at 1167.

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Moreover, Defendants argue that the appearance of manufactured homes differs from other types of housing, and therefore that the distinction in Ordinance 1501 has a rational basis. They point out that, since manufactured homes are fully constructed in one location and transported to another location for use or sale, they must be constructed to an appropriate width or length to travel the roads. Mr. Harrington states that homebuyers tend to prefer neighborhoods where the houses are of a similar type and size, as is "demonstrated in the market place where large planned developments which pay careful attention to the construction of neighborhoods of architecturally compatible housing have had great success in attracting buyers." Harrington Affidavit, at 3; *see also* Henry Report, at 2.[8] The Defendants' experts also state that manufactured housing is "easily distinguishable" from other types of housing. Henry Report, at 2; Harrington Affidavit, at 2 ("basic rectangular shape and flat roof design of many mobile home[s] give them a distinctive appearance that identifies them as mobile homes even when additional skirting and trim is added").[9]

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8. Defendants also proffer the expert report and affidavit of Charles A. Smith, Ph.D., who renders his opinion "that zoning in general tends to preserve residential property values, and furthermore that manufactured housing should be restricted to an area zoned for that specific type of structure." Report of Charles A. Smith [Doc. # 41], at 1. While Dr. Smith states that it is his opinion that prohibiting manufactured housing in La Porte's R-1 districts generally promotes preservation of property values in La Porte, he has not conducted a detailed study and analysis of the City; his opinion is based on his "historical research into manufactured housing and mobile home parks," as well as his appraisal experience and study of La Porte's zoning map. *Id.*

9. Plaintiff's argument that the City's actions are arbitrary because the characteristics of other types of homes are not regulated is unavailing since, as stated previously, legislative classifications need not be perfect. *Vance*, 440 U.S. at 108-09; *Horizon Concepts*, 789 F.2d at 1167.

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In the past, the courts have upheld rationales similar to La Porte's. *See, e.g., City of Brookside Village v. Comeau*, 633 S.W.2d. 790 (Tex. 1982), *cert. denied*, 459 U.S. 1087 (1982) (regulation of mobile home parks and restriction of location of mobile homes is a valid exercise of a municipality's police power); *Grant v. Seminole County, Fla.*, 817 F.2d 731 (11th Cir. 1987); *Horizon Concepts, Inc. v. City of Balch Springs*, 789 F.2d 1165 (5th Cir. 1986). Nevertheless, "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases" for differential treatment. *City of Cleburne, Tx. v. Cleburne Living Center*, 473 U.S. 432, 448 (1985).

TMHA argues that, if there were ever grounds for exclusion of manufactured housing, such grounds no longer exist because manufactured housing has changed significantly in recent years, and particularly since the *Comeau* case was decided. First, TMHA states that, since 1982, several studies have been conducted across the country which have analyzed the issue of property values and these studies have uniformly concluded that property values are unaffected by the presence of manufactured homes.[10] Furthermore, Plaintiffs maintain that no

10. Supporting Affidavit of Will Ehrle, President and General Counsel of TMHA (Exhibit E to Response) (hereinafter "Ehrle Affidavit"), at 7-8 (a 1990 study sponsored by the Michigan Department of Commerce and conducted by a team of researchers from the University of Michigan concluded that property values of conventional site-built homes are not diminished by adjacent development with HUD-code manufactured housing; other studies from New Hampshire, California, North Carolina and Georgia, whose dates are not specified, reached the same conclusion). *See also* Supporting Affidavit of Waldo S. Luedemann, Jr., Texas State Certified General Appraiser (Exhibit D to Response), at 9. Mr. Luedemann was commissioned by Plaintiffs to study property values in La Porte and concluded that, among other things, placement of a HUD-code manufactured home on Stevenson's lot would not have a negative impact on surrounding property values.

studies exist which support Defendants' assumptions.[11] However, whether or not Defendants cite studies supporting their position is not dispositive on the question of whether their position is legally sufficient as a rational basis.

Second, TMHA argues that, because of continuing advancements and enhancements fortified by a stringent federal building code,[12] the general "assumptions" about manufactured housing are no longer factually correct, if they ever were. While in 1982 there were many differences in the exterior appearances of manufactured homes and site-built homes, many HUD-code manufactured homes built today "bear a striking resemblance" to site-built homes and may possess such conventional features as pitched roofs, brick and wood facades, fireplaces, bay

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11. Supporting Affidavit of Welford Sanders (Exhibit F to Response) (hereinafter "Sanders Affidavit"), at 7 (Mr. Sanders states that he has "studied the manufactured housing industry for years, and [is] personally unfamiliar with any study which reaches the biased and prejudiced conclusions voiced by Mr. Harrington"); Ehrle Affidavit, at 7.

Defendants stated in their interrogatory answers that they could cite no studies supporting their position. City of La Porte's Responses to Plaintiffs' First Set of Interrogatories, Requests for Admissions, and Requests for Production (Exhibit M to Response), at 8 ("[t]he City admits that, to the knowledge of its current officials, it does not have any written studies, correspondence, or reports which specifically address the benefits of the classifications at issue"). Neither the City nor the ZBA commissioned its own study to address the impact of placing manufactured homes in the R-1 district. *Id.* at 25; ZBA's Responses to Plaintiffs' First Set of Interrogatories, Requests for Admissions, and Requests for Production (Exhibit N to Response), at 21.

12. There have also been changes in the HUD code since 1982 which impose more stringent requirements of durability and energy efficiency on manufactured homes. Ehrle Affidavit, at 4.

windows, permanent foundations, and attached garages. Ehrle Affidavit, at 3-4; Welford Sanders, *Regulated Manufactured Housing* (Exhibit H to Response), at 2, 10-11, 34-35 (photographs of HUD-code manufactured houses). Charles Harrington, in his deposition, also agreed that manufactured housing has greatly improved in recent years. Deposition of Charles R. Harrington (Exhibit K to Response), at 140-143. Nevertheless, as TMHA stated during oral argument before this Court on October 10, 1995, the appearance of HUD-code manufactured homes can vary widely. Evidence that "many" HUD-code homes are similar to conventional homes and that they "may" possess conventional features is little assurance that all or even most HUD-code manufactured homes will have an appearance comparable to conventional homes.

Accepting as true all of Plaintiff's evidence concerning the quality of manufactured housing and the recent vast improvements in the industry, the Court finds that there is no genuine issue of material fact on this claim. Defendants have presented several rational bases for the exclusion of HUD-code manufactured homes from the City's R-1 districts, as well as supporting facts and expert opinions. The Court is persuaded that, as a matter of law, Defendants' explanations suffice as a rational basis for the exclusion and that Plaintiff's evidence of differences of opinion on these rationales is insufficient to create a genuine issue of material fact. Therefore, summary judgment is granted on Plaintiff's substantive due process claim.

Equal Protection

Plaintiff argues that its equal protection claim must be judged under different standards than its substantive due process claim because Ordinance 1501's differential treatment of

manufactured homes and modular/industrialized homes is subject to intermediate scrutiny under the equal protection clause. The Court finds this argument to be wholly unpersuasive. Although Plaintiff argues that higher scrutiny is warranted because manufactured housing is "politically unpopular," ownership of manufactured housing clearly does not qualify as a suspect classification under equal protection jurisprudence. Moreover, even if the right to shelter were recognized as a fundamental constitutional right, the connection between the right to shelter and the location of manufactured housing is too attenuated to trigger a higher standard of review.

Plaintiff's equal protection claims therefore will be evaluated under the rational basis test. *See Horizon Concepts*, 789 F.2d at 1167. For the reasons cited in the discussion of Plaintiff's substantive due process claims, the Court finds that no genuine issue of material fact exists as to this claim. Therefore, summary judgment is granted as to Plaintiff's equal protection claim.

Federal Preemption

TMHA argues that Ordinance 1501's restriction on the location of HUD-code manufactured homes is preempted by the National Manufactured Housing Construction and Safety Standards Act, 42 U.S.C. § 5401 *et seq.*, and specifically by the following language:

> Whenever a Federal manufactured home construction and safety standard established under this chapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue

> in effect, with respect to any manufactured home covered, any standard regarding construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the Federal manufactured home construction and safety standard.

42 U.S.C. § 5403(d).

While this federal statute has preempted the manufactured housing field as to construction, safety, and installation, nothing in the statute creates a conflict with Ordinance 1501's regulation of the *location* of mobile homes. *See City of Brookside Village v. Comeau*, 633 S.W.2d 790, 796 (Tex. 1982). TMHA's argument that the ordinance is preempted because the "exclusion of HUD-code manufactured homes from R-1 districts is a thinly veiled attempt to impose tougher safety and construction standards on HUD-code manufactured homes," Response, at 50, is merely an unsupported assertion and is insufficient to defeat a motion for summary judgment. *See Little*, 37 F.3d at 1075.[13] Moreover, even accepting *arguendo* Plaintiff's assertion that the only material difference between modular homes and manufactured homes is the relevant building code standards, this does not support Plaintiff's conclusion that Ordinance 1501 has the effect of imposing La Porte's building code on

13. Plaintiff's only arguments on this point are that the City "cannot point to any legitimate reasons for treating HUD-code manufactured housing differently than other types of single-family housing," and that the homes permitted in R-1 districts are those constructed to state building codes while those banned in R-1 districts are built to a federal code. These statements, even if true, lend no support to Plaintiff's argument that Ordinance 1501 is an attempt to regulate safety and construction standards.

manufactured housing.[14] Indeed, rather than imposing certain local standards on manufactured homes, the City has simply banned them from R-1 districts. *Cf. Scurlock v. City of Lynn Haven*, 858 F.2d 1521 (11th Cir. 1988) (ordinance, which provided that mobile homes in residentially-zoned regions must meet construction and safety requirements other than those specified by HUD, is preempted by federal statute; city could, however, exclude mobile homes from residential region). Therefore, summary judgment in favor of Defendants is granted on the federal preemption claim. Plaintiff's motion for summary judgment on this claim is denied.

State Preemption

TMHA argues that Ordinance 1501 is unenforceable because it is in conflict with Texas' Manufactured Housing Standards Act. Tex. Rev. Civ. Stat. Ann. art. 5221f (Vernon 1987 & Supp. 1996).[15] Specifically, TMHA points to the following provision:

> An incorporated city may prohibit the installation of a mobile home for use or occupancy as a residential dwelling within its corporate limits. Any such prohibition must be prospective and shall not apply to a mobile home previously legally permitted

14. *See* Plaintiff's Motion for Partial Summary Judgment [Doc. # 46] (hereinafter "Plaintiff's Summary Judgment Motion"), at 13-15.

15. Ordinances may not contain any provision which is inconsistent with the general laws of the State of Texas. Tex. Const. art. XI, § 5; *Dallas Merchant's and Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 491 (Tex. 1993).

> and used or occupied as a residential dwelling within the city. Permits for such use and occupancy must be granted by an incorporated city for the replacement of a mobile home within its corporate limits with a HUD-code manufactured home.

Tex. Rev. Civ. Stat. Ann. art. 5221f, § 4A(a). TMHA argues that this provision demonstrates that the state legislature "has deemed it advisable to give owners of manufactured housing the unfettered right to replace their abodes with HUD-code manufactured housing." Response, at 51-52; *see also* Plaintiff's Summary Judgment Motion, at 15-17.

TMHA's reading of Section 4A is flawed. The provision clearly allows for the replacement of "mobile homes" with "HUD-code manufactured homes," so as to encourage the replacement of substandard housing. "Mobile homes" are defined by the statute as structures built before June 15, 1976, where as "HUD-code manufactured homes" are defined as structures built on or after June 15, 1976 and according to the rules of the United States Department of Housing and Urban Development. *See* Tex. Rev. Civ. Stat. Ann. art. 5221f, §§ 3(1) & 3(19). However, no language in the provision grants a person such as Ms. Stevenson the "unfettered right" to replace her home with a HUD-code manufactured home, especially given that the home Ms. Stevenson sought to replace was not a "mobile home" but a "HUD-code manufactured home." Moreover, the subsequent section of Article 5221f confirms the legislature's intent to permit cities to prohibit HUD-code manufactured homes in certain districts. Tex. Rev. Civ. Stat. Ann. art. 5221f, § 4A(b) ("[u]pon application the installation of HUD-Code manufactured homes shall be permitted as residential dwellings *in those areas determined appropriate by the city*") (emphasis added).

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Since TMHA has failed to demonstrate any genuine issue of material fact as to the issue of state preemption, summary judgment in favor of Defendants is granted. Plaintiff's summary judgment motion is denied.

Commerce Clause

TMHA argues that Ordinance 1501 violates the Commerce Clause of the United States Constitution.[16] Specifically, TMHA argues that the ordinance prefers intrastate commerce over interstate commerce because modular/industrialized homes which are sold in Texas are constructed in Texas by a "distinctly local industry,"[17] whereas HUD-code manufactured housing is constructed in other states as well as in Texas and is "by design and in practice, interstate in nature." Response, at 33-34; Affidavit of Will Ehrle (Exhibit E to Response), at 3, 5-6.

Actions that "burden interstate commerce or impede its free flow" are within the domain of the Commerce Clause. *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 114 S. Ct. 1677, 1681 (1994); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981). The first step in Commerce Clause analysis is to determine whether the regulation regulates evenhandedly with

16. U.S. Const., art. I, § 8, cl. 3 ("[t]he Congress shall have Power . . . [t]o regulate Commerce . . . among the several states"). The Commerce Clause not only grants power to Congress but also limits the power of state and local governments to discriminate against interstate commerce. *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 114 S. Ct. 1677 (1994); *Wyoming v. Oklahoma*, 112 S. Ct. 789, 800 (1992).

17. Will Ehrle, President and General Counsel of TMHA, states in his affidavit that, to his knowledge, "no manufacturer outside of Texas is constructing and shipping industrialized/modular housing for sale in Texas." Affidavit of Will Ehrle (Exhibit E to Response), at 6.

only incidental effects on interstate commerce, or discriminates against interstate commerce. *Fulton Corp. v. Faulkner*, 116 S. Ct. 848, 854 (1996); *Oregon Waste Systems v. Dep't of Envtl. Quality*, 114 S. Ct. 1345, 1350 (1994). Discriminatory effect, as well as discrimination on the face of the regulation, is prohibited. *C & A Carbone*, 114 S. Ct. at 1684; *Cooper v. McBeath*, 11 F.3d 547, 553 (5th Cir.), *cert. denied*, 114 S. Ct. 2675 (1994). Nondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Oregon Waste*, 114 S. Ct. at 1350.

HUD-code manufactured homes are permitted in all residential districts of the City other than R-1 districts. Response, at 34. Plaintiff's argument that the ordinance's restriction has a substantial effect on interstate commerce because it "restricts the flow of HUD-code manufactured homes into the City's R-1 districts," Response, at 37, is unavailing because, as Plaintiff's argument implicitly concedes, HUD-code manufactured homes are not banned from the City, but only from its R-1 districts.

The Court finds that Ordinance 1501 regulates evenhandedly and that, since HUD-code manufactured homes may flow freely into La Porte, there is only an incidental effect, if any, on interstate commerce. *See Fulton Corp.*, 116 S. Ct. at 854; *C & A Carbone*, 114 S. Ct. at 1681. Moreover, although Plaintiff has provided some evidence in support of its claim that interstate commerce is burdened,[18] there is no basis for a

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18. Plaintiff has proffered evidence that the manufactured housing industry has suffered lost sales in the City of La Porte due to restriction on placement of manufactured homes. Plaintiffs' Supplemental Response in Opposition to Defendants' Motion for Summary Judgment [Doc. # 43], at 5; Affidavit of Gordon H. Otto and attachments (Exhibit O to Supplemental Response). Given the large number of obvious variables that may affect sales of HUD-code homes, this evidence is not necessarily probative.

conclusion by this Court that any such burden is "clearly excessive" in relation to the local benefits that result from a general zoning ordinance restricting the location of manufactured homes. *See Oregon Waste*, 114 S. Ct. at 1350; *see also* Henry Report (reciting reasons for exclusion of manufactured homes from La Porte's R-1 districts); Harrington Affidavit (same).

Plaintiff has failed to demonstrate any genuine issue of material fact on this issue.[19] Therefore, summary judgment in favor of Defendants is granted on Plaintiff's Commerce Clause claim. Plaintiff's motion for summary judgment is denied.

Takings and Procedural Due Process Claims

The complaint in this action alleges that Ordinance 1501, as applied by Defendants to Janet Stevenson, violates the "takings" clauses of the federal and state constitutions. Complaint, at 12. The Court has been informed by a letter from Stevenson's counsel, dated March 15, 1996, that all claims urged by Stevenson against the Defendants have been settled after mediation. Therefore, the takings claims urged by Plaintiff are **DISMISSED AS MOOT.**[20]

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19. The Court is similarly unpersuaded by Plaintiff's argument that regional jealousies and retaliatory measures, which the commerce clause is designed to protect against, could result if HUD-code homes from other states are not given "free access" to the market of La Porte and other cities in Texas.

20. While the Court does not conclusively decide the takings issue, it appears that Plaintiff's takings claim fails because the zoning ordinance substantially advances legitimate state interests. *See Dolan v. City of Tigard*, 114 S. Ct. 2309, 2316 (1994); *Agins v. City of Tiburon*, 447 U.S. 255, 260-

(Cont'd)

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Privileges and Immunities Clause/Right to Travel

TMHA argues that the Ordinance 1501 impermissibly restricts its constitutional right to travel. A law implicates the right to travel when it actually deters such travel, when impeding travel is its primary objective, or when it uses any classification which serves to penalize the exercise of the right. *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 903 (1986). Plaintiff argues that the ordinance actually deters and penalizes travel because HUD-code manufactured homes, which are more affordable than either modular/industrialized homes or conventional site-built homes, are prohibited in La Porte's R-1 districts. As a result, Plaintiff states, "persons desiring a residence in the City of La Porte, both current and new residents alike, face dramatically increased housing costs . . . [that] force low- to moderate-income persons to either abandon their rights to reside in the City of La Porte . . . or to pay the tax and toll demanded by the City of La Porte for the alleged maintenance of someone else's 'property values.' " Response, at 54-55.

(Cont'd)

63 (1980). Moreover, it appears that the alleged reduction of Stevenson's property value due to Ordinance 1501's ban on manufactured homes fails to constitute a sufficiently significant economic deprivation to create a compensable taking. *Dolan*, 114 S. Ct. at 2316; *Agins*, 447 U.S. at 260-63. *See also* 2 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 15.12, at 97 (Supp. 1996) ("[u]nder the case-by-case approach of the Supreme Court, it appears that a lower court should not find that a general property regulation resulted in a taking of property unless the property owner demonstrates that the regulation has resulted in a severe economic loss to the property owner and that the government action is not rationally related to any legitimate governmental interest"). Stevenson clearly has not been deprived of all economically viable uses of her land. *See Tex. Manufactured Hous. Ass'n v. City of Nederland*, 905 F. Supp. 371, 378 (E.D. Tex. 1995).

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As noted in the analysis of Plaintiff's commerce clause claim, HUD-code manufactured homes, while prohibited in La Porte's R-1 districts, are permitted elsewhere in the City. Ordinance 1501 does not penalize exercise of the right to travel between states, or even between La Porte and other municipalities, because those preferring HUD-code manufactured homes may erect and reside in them within the City of La Porte. Since Plaintiff has failed to demonstrate any genuine issue of material fact as to the right to travel, summary judgment is appropriate in favor of Defendants on this claim.[21]

Right to Privacy

A person's most intimate and personal choices, such as marriage, procreation, contraception, and family relationships, are constitutionally protected from government intrusion. *See, e.g., Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2807 (1992); *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977). Plaintiff argues that, since many of these activities occur in one's home, the "style and form of one's own house falls within the boundaries of the zone of privacy outlined and protected by the Supreme Court." Response, at 57. Plaintiff has also asserted that an ordinance which prohibits HUD-code manufactured homes in one district of the City constitutes an "intrusive regulation of the family." Response, at 59. The Court finds this argument frivolous. The authorities cited by Plaintiff do not

21. Plaintiff's complaint asserts the right to travel as guaranteed by the Texas Constitution, as well as by the Privileges and Immunities Clauses of the U.S. Constitution, U.S. Const. art. IV & Am. 14. Since Plaintiff has presented no authority or argument suggesting that any right to travel that exists under the Texas Constitution should be analyzed under different standards than the federal constitutional right, summary judgment as to the state constitutional claim is also granted.

support such an unprecedented extension of the constitutional right to privacy. Summary judgment in favor of Defendants is granted on this claim.

Civil Rights Act of 1871

TMHA brings its constitutional and preemption claims pursuant to the Civil Rights Act of 1871, codified at 42 U.S.C. § 1983.[22] Section 1983 creates no substantive rights in itself, but provides a remedy for violation of the Constitution or federal laws. Given that summary judgment has been granted in favor of Defendants on all of Plaintiff's claims, summary judgment on Plaintiff's Section 1983 claim is also granted.

CONCLUSION

The Court has given serious consideration to all arguments presented by the parties, and has perused the record carefully. Plaintiff's recent motion demonstrates no genuine issue of material fact whatsoever. It is hereby

ORDERED that Defendants' **Motion for Summary Judgment** [Doc. # 13] is **GRANTED**. It is further

ORDERED that Plaintiff's **Motion for Partial Summary Judgment** [Doc. # 46] is **DENIED**. It is further

ORDERED that Plaintiff's **Request for a Permanent Injunction** [Doc. # 1] is **DENIED**.

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22. 42 U.S.C. § 1983 provides for liability for "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage," subjects another to "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."

Appendix D

SIGNED at Houston, Texas, this 1st day of April, 1996.

s/ Nancy F. Atlas
NANCY F. ATLAS
UNITED STATES DISTRICT JUDGE

APPENDIX E — RELEVANT GUIDELINES AND POLICY STATEMENTS OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 3282

[Docket No. FR-4192-N-01]

Manufactured Housing Construction and Safety Standards: Notice of Internal Guidance on Preemption

AGENCY: Office of the Assistant Secretary for Housing — Federal Housing Commissioner, HUD.

ACTION: Notice of staff guidance.

SUMMARY: The Office of Consumer and Regulatory Affairs in HUD has developed guidelines to assist its staff in addressing preemption issues concerning the National Manufactured Housing Construction and Safety Standards Act of 1974. Because of the interest of outside persons in the subject generally, HUD has decided to publish these internal guidelines to assist regulated entities and consumers in understanding the guidelines under which HUD will be operating. These guidelines are not binding on either HUD or the public and are published for informational purposes only.

FOR FURTHER INFORMATION CONTACT: David R. Williamson, Director, Office of Consumer and Regulatory Affairs, Department of Housing and Urban Development, Room 9156, 451 Seventh Street, SW., Washington, DC 20410-0500; telephone (202) 708-6401, or on e-mail through Internet at

David__R.__Williamson@hud.gov. For hearing and speech-impaired persons, the telephone number may be accessed via TTY (text telephone) by calling the Federal Information Relay Service at 1-800-877-8339. (Other than the "800" number, these telephone numbers are not toll-free).

SUPPLEMENTARY INFORMATION: The staff guidelines reproduced in this notice are internal guidance to assist the HUD office administering the manufactured housing program in answering questions from the public as to whether particular State or local laws or regulations are preempted by the National Manufactured Housing Construction and Safety Standards Act of 1974 (42 U.S.C. 5401-5426) (the Act). The guidelines are based upon the Act and its implementing regulations in 24 CFR parts 3280, 3282, and 3800 and do not provide new interpretations of the Act or create new HUD policy. The guidelines were developed to assist HUD staff in giving uniform and timely responses to the public, including consumers and affected industries, and State and local governments on preemption issues.

HUD is publishing these guidelines because of the interest in preemption questions that has been expressed by members of these groups. HUD welcomes comments on these guidelines. Anyone wishing to comment on these guidelines may do so by submitting written comments to the attention of the person listed in the "For Further Information Contact" section of this notice.

The internal guidelines that were prepared are as follows:

Appendix E

Guidelines for Analyzing Situations Involving Preemption Under the Manufactured Home Construction and Safety Standards Act

I. Introduction

These guidelines have been prepared to assist in answering questions from the public as to whether particular State or local laws or regulations are preempted by the Act. These guidelines are based upon the National Manufactured Housing Construction and Safety Standards Act and its implementing regulations and are not intended to add new interpretations to the Act or to create new HUD policy.

II. Statutory And Regulatory Background

The Act establishes a national set of construction standards for manufactured housing. To ensure that State or local governments did not enact or allow to continue conflicting construction standards, Congress provided that no State or local government could establish a standard dealing with an aspect of performance that is not identical to those standards established under the Act (section 604(d)). However, where there is no Federal standard. the States are free to act (section 623(a)).

HUD has interpreted these statutory provisions in its regulations implementing the Act (24 CFR 3282.11). In accordance with the Act, the regulation bars States from imposing a manufactured home standard regarding construction and safety that covers the same aspects of performance governed by a Federal standard. More generally, States may not take any action that could interfere with the Federal superintendence of the industry as established by the Act (24 CFR 3282.11).

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The Act does not impose a duty on HUD to make any determinations as to the applicability of the preemption provision, to investigate preemption issues, or to render advisory opinions regarding preemption questions. Further, a State is not specifically prohibited under section 610 of the Act from implementing a provision that is preempted, nor is there any requirement under the Act for the Secretary to enforce the preemption provision. Generally, enforcement of preemption requirements is left up to the Courts. Where an issue is unclear, it is appropriate for the Courts to decide whether a State or local requirement is preempted.

To the extent possible, HUD wishes to be responsive to inquiries of consumers, the industry, and State or local governments on the applicability of preemption. These responses should be considered as an effort by HUD to advise the public of its construction of the statute and the rules which it administers, and to give its opinion as to the applicable law and the particular facts.

III. Guidelines for Specific Situations

Most inquiries can be responded to merely by discerning if there is a specific Federal standard which addresses the same aspect of performance as the State standard. If so, the Federal law preempts the State law. In a significant number of cases, however, the determination is not as clear and requires either an engineering or legal analysis, or both. There are four general areas of inquiry which are frequently raised:

A. Installation

There is no specific Federal standard that deals with the

installation of manufactured homes. As such, standards as to the installation of manufactured homes can be regulated by local or State governments and are not preempted under the Act.

It is possible, however, that a local installation rule may hinder the implementation of Federal standards. For example, the implementation of a local rule may conflict with a requirement of a Federal construction standard for plumbing or water hookup. In such cases, the local rule is preempted.

B. Zoning

Normally, zoning issues fall outside the scope of the preemption provisions of sections 604 of the Act. There may be limited instances, however, in which the Federal definition of "manufactured home" could fall within the broad definitions applied to prefabricated or factory built homes under the local zoning ordinance. Such homes are treated differently depending on the building code under which they are constructed.

Generally, the enforcement of a local ordinance regulating the location of manufactured homes has not been subjected to the regulatory authority of the Act because such enforcement rests on the locality's right to determine proper land use. In addition, a locality is free to adopt and enforce ordinances that regulate the appearance and dimensions of homes so long as the criteria established by such ordinances do not have the effect of excluding manufactured homes based on the construction and safety standards to which they were built. Such regulation of aesthetics protects property values, preserves the character and integrity of communities and neighborhoods, and assures architectural compatibility.

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If a locality, however, is attempting to regulate, and even exclude, certain manufactured homes through zoning enforcement that is based solely on a construction and safety code different from that prescribed by the Act, the locality lacks such authority. Thus, a locality cannot accept structures meeting the Federal definition of manufactured homes which comply with different standards, such as the local or State Building Code, and exclude or restrict manufactured homes that are aesthetically the same but only meet the Federal standards. By excluding or restricting only manufactured homes built to the Federal standards, and accepting manufactured homes built to other codes, the locality is establishing standards different than the Federal standards.

A locality is not in conflict with the preemptive provisions of the Act if, without regard to construction standards, it treats all structures that meet the Federal definition of Manufactured Homes the same under local zoning laws.

C. State Enforcement

A number of questions have arisen as to when a State's enforcement of manufactured housing standards are preempted by Federal law. HUD's regulations at 24 CFR 3282.11(c) and (d) set forth a clear standard as to the appropriateness of State enforcement of its manufactured home standards. The Federal regulations prohibit a State from establishing a code enforcement system for manufactured homes which is outside, or goes beyond, those enforcement procedures specifically set forth in the Federal regulations. "The test of whether a State rule or action is valid or must give way is whether the State rule can be enforced, or the action taken, without impairing the Federal superintendence of the manufactured home industry as

established by the Act" (24 CFR 3282.11(d)). There are several specific situations:

1. A State, as a State Administrative Agency (SAA) under section 623 of the Act, can enforce the Federal standards. It may also enforce State standards which are identical to the Federal standards. Such actions would not be preempted. However, the State's system of enforcing these standards must be identical to the enforcement procedures in the Federal regulations. "No State may establish * * * procedures or requirements * * * which * * * require remedial actions which are not required by the Act and the regulations" (24 CFR 3282.11(c)).

2. A State may enforce its own consumer protection or warranty laws as to defects in individual homes. As such, a State may require a manufacturer to correct noncompliances and defects in response to individual consumer complaints. Such acts would not be preempted by Federal law (24 CFR 3282.11(d)).

3. Notwithstanding the above, however, there are limitations on a State's actions to correct individual homes. These are situations in which State action would interfere with Federal superintendence of the manufactured home industry.

(a) *Imminent safety hazards or serious defects.* Where it appears that there is an imminent safety hazard or a serious defect, the State is required to refer the matter to HUD for enforcement (24 CFR 3282.405(b) and 3282.407(a)).

(b) *Class of manufactured homes.* Where it appears that the same defect exists in a class of manufactured homes and the

State is *not* the State in which the homes were produced, then the State is required to refer the matter to the SAA in the State in which the homes were produced or to HUD (if there is no SAA in the State of production) for enforcement. Further, if a class of defective homes is produced in more than one state, HUD is responsible for the enforcement actions. If the homes were all manufactured in the State, the State may take actions, consistent with the Federal regulations, with regard to the noncompliance and defects (24 CFR 3282.405(b) and 3282.407(a)(3)).

(c) *Prior HUD enforcement.* Where HUD has already taken action to have a class of serious defects corrected, then the State is preempted from taking corrective actions of its own pursuant to the Act (24 CFR 3282.404(e)).

D. Utility Companies

There have been a few utility companies which have attempted to impose their own construction or safety standards on manufactured homes as a requirement for connection to their services. The Act, by its express terms, prohibits only "State or political subdivisions of a State" from establishing standards that conflict with the Federal standards (section 604(d)). Accordingly, if the utility company is owned or controlled by a political subdivision, its standards are preempted by the Federal standards. If the utility is privately owned, its standards would not be preempted.

E. State Construction and Safety Standards

1. *Aspects of performance.* Additional questions arise in situations in which the State or locality attempts to apply its

own building or safety code to the manufactured home. Under section 604 of the Act, State law is preempted whenever there is a State performance standard regarding construction and safety that is not identical to an established Federal standard. On the other hand, section 623 of the Act provides that Federal law does not preempt State construction or safety standards for which a Federal standard had not been established. Thus, for there to be Federal preemption, there must be a specific aspect of a Federal performance standard which duplicates a local standard.

Federal preemption cannot be based upon a general purpose of the Act, or the need for national uniformity in the manufactured housing industry. The courts have applied this "aspect of performance" standard in analogous situations by focusing not on the purpose or scope of the Act, but, rather, on the specific requirements of an established Federal standard. If the Federal standard is encompassed or impacted by the State requirement, the State law is preempted.

2. *Superintendence.* It is also possible that a State or local law may be preempted even though the local rule does not meet the differing aspect of performance standard. As stated above, 24 CFR 3282.11(d) sets forth an additional standard of preemption. A State rule must give way if it impairs the Federal superintendence of the manufactured home industry as established by the Act.

Thus, for example, a local requirement that all homes be constructed on site, while not covering any aspect of performance, would be so fundamentally in conflict with the Federal standards as to impair the Federal superintendence of the manufactured home program. Such a requirement would be preempted under the HUD regulations.

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The scope of this regulatory provision is limited by the language "as established by the Act". This language limits the Federal superintendence of the industry, since section 604(d) of the Act limits the preemption of standards to only those issues dealing with the same aspects of performance.

Authority: 42 U.S.C. 3535(d) and 5401 et seq.

Dated: January 14, 1997.

Stephanie A. Smith,

General Deputy, Assistant Secretary for Housing-Federal Housing Commissioner.

* * *

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 3280 and 3282

[Docket No. FR-4223-N-01]

Manufactured Housing: Statement of Policy 1997-1, State and Local Zoning Determinations Involving HUD-Code

AGENCY: Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.

ACTION: Statement of policy.

SUMMARY: This Statement of Policy provides notice to the

public concerning HUD's application of the National Manufactured Housing Construction and Safety Standards Act of 1974 (Act) to certain zoning decisions being made by State or local government. These cases typically involve State or local actions to prohibit the siting of HUD-code manufactured housing while permitting the siting of other types of manufactured housing built to State or local building codes.

If a locality is attempting to regulate and even exclude certain manufactured homes through zoning enforcement that is based solely on a construction and safety code different than that prescribed by the Act, the locality is without authority to do so. This Statement of Policy is being provided to clarify and distribute HUD's existing policy determination concerning this matter.

FOR FURTHER INFORMATION CONTACT: David R. Williamson, Director, Office of Consumer and Regulatory Affairs, Department of Housing and Urban Development, 451 7th St. SW, Room 9152, Washington, D.C. 20410-8000), telephone number (202) 708-6409 (this is not a toll-free number). For hearing-and speech-impaired persons, this number may be accessed via TTY by calling the Federal Information Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

I. Background

Over the last few years, HUD has received a number of questions concerning the application of the Federal preemption authority in the National Manufactured Housing Construction and Safety Standards Act of 1974 (42 U.S.C. 5401-5426) (Act)

to actions by State or local government. HUD recently published a nonbinding notice of staff guidance, which it hoped would assist the public on some of these questions (62 FR 3456, January 23, 1997).

In certain cases involving questions of preemption and zoning, the State or local government is imposing more limitations on the placement of manufactured homes that are built to the Federal manufactured home construction and safety standards (24 CFR part 3282) (Federal standards) than on other types of factory-built single family housing. In the past, HUD has sent letters to various communities in such cases, where local zoning laws are in direct conflict with the Federal Act and regulations.

II. Increasing Homeownership and the Supply and Availability of Affordable Housing

The elimination of barriers to the expanded use of affordable housing, including manufactured homes, has been one of the primary objectives of the President's National Homeownership Strategy. HUD coordinates the National Partners in Homeownership, which now has over 60 national organizations participating, including State, county and local governments, and other groups, to identify and promote ways to increase homeownership and the supply of affordable housing. The Strategy includes the following goals and objectives in Action Item 27:

- The partnership should identify and promote zoning and land development policies that are more conducive to manufactured housing. As part of this initiative, partners should develop model legislation for States and localities

to adopt that prohibits exclusion of manufactured housing solely on the basis of HUD certification (manufacturer certification that the home has been constructed to the Federal standards).

- The partners also should produce design and land development criteria and guidance materials for use by housing developers and local governments, to facilitate inclusion of manufactured housing in their jurisdictions. To supplement these efforts, the partnership should offer a cooperative program of education and technical assistance to encourage nationwide acceptance of the model legislation within 6 years.

HUD strongly endorses this Action Item, particularly making available sites for manufactured housing outside of parks and largely rural areas. On March 22, 1996, the Manufactured Housing Institute (MHI) and the American Planning Association (APA) convened a National Partners in Homeownership Forum to discuss zoning and other issues. The Forum drew over 100 attendees including planners, housing-advocacy organizations, and representatives from the manufactured housing industry.

The attendees reached an almost unanimous consensus that very real zoning and other regulatory barriers exist that significantly hinder the full use of manufactured housing. The Forum produced a series of recommendations to HUD and the National Partners in Homeownership, including APA and MHI.

This Statement of Policy is being issued as an initial step toward the elimination of barriers to the use of manufactured housing and in furtherance of the goals and objectives of the National Homeownership Strategy.

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III. Requirements of Act and Regulations

Section 604(d) of the Act, 42 U.S.C. 5403(d), states:

> Whenever a Federal manufactured home construction and safety standard established under [the Act] is in effect, no State or political subdivision of a State shall have any authority * * * to establish, * * * with respect to any manufactured home covered, any standard regarding construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the Federal manufactured home construction and safety standard.

The term "manufactured home" is defined in section 603(6) of the Act, 42 U.S.C. 5402(6). In addition, Sec. 3282.11(d) of the Manufactured Home Procedural and Enforcement Regulations (24 CFR part 3282) prohibits any State or locality from establishing and enforcing rules or taking any action that impairs the Federal superintendence of the manufactured home industry.

Conversely, section 623(a) of the Act (42 U.S.C. 5422(a)) provides:

> Nothing in this [Act] shall prevent any State agency or court from asserting jurisdiction under State law over any manufactured home construction or safety issue with respect to which no Federal manufactured home construction and safety standard has been established. * * *

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IV. Statement of Policy 1997-1

Generally, the adoption and enforcement of a local zoning ordinance regulating the location of manufactured homes has not been subjected to the regulatory authority of the Act because such actions are exercises of the locality's authority to determine proper land use. Under section 604(d) of the Act (42 U.S.C. 5403(d)), however, the locality is without authority to regulate or exclude certain manufactured homes through zoning ordinances or enforcement decisions that are based solely on a construction and safety code that is different from the Federal standards prescribed under the Act.

For example, assume two structures are brought into a locality and both structures are: 320 or more square feet when erected on site; built on a permanent chassis; and transported in one or more sections. If the locality only allows the structure that is built to the State or local building code to be sited outside an approved mobile home park, the locality would be acting without authority. If under the local zoning laws the locality accords the same treatment to all structures that meet the Act's definition of a "Manufactured home" (42 U.S.C. 5402(6)), the locality is not in conflict with the preemptive provisions of the Act.

Therefore, a locality cannot exclude or restrict manufactured homes that meet the Federal standards if the locality accepts manufactured homes meeting other standards. By excluding or restricting only manufactured homes built to the Federal standards and accepting manufactured homes built to State or local codes, the locality is establishing standards for manufactured homes that are different from the Federal standards. To the extent that the provisions or enforcement of local zoning regulations require that manufactured homes meet standards

other than the Federal standards for manufactured homes, those local actions are preempted by section 604(d) of the Act (42 U.S.C. 5403(d)). Furthermore, such a system of local regulation and enforcement would interfere with Federal superintendence of the manufactured home industry, in contravention of 24 CFR 3282.11(d).

Dated: April 24, 1997.

Nicolas P. Retsinas,

Assistant Secretary for Housing-Federal Housing Commissioner.

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